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# Business Associations and Professions

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# Business Associations and Professions

## Business Associations and Professions; additions of cable television franchises

Government Code § 53066.3 (amended).  
AB 2892 (Moore); 1990 STAT. Ch. 413

Under existing law, a city, county, or city and county presently served by cable television may grant an additional cable franchise subsequent to a public hearing.<sup>1</sup> Prior to the enactment of Chapter 413, any new franchisee was required to wire and serve the same geographical area as the established franchise.<sup>2</sup>

Chapter 413 limits the additional cable franchise service requirements to apply only if a previously existing franchise has already been granted and that franchisee is providing or is ready to provide service.<sup>3</sup> Chapter 413 excuses the additional similar service requirements where the established cable operators certify that they do not plan to serve the area proposed to be served by the additional operator.<sup>4</sup>

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1. CAL. GOV'T CODE § 53066.3(a) (amended by Chapter 413). The hearing must address the suitability of the prospective franchisee and the effect of the new franchise on the community. *Id. See also* Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 971-74 (N.D. Cal. 1987) (city may require evidence of cable television franchisee's financial resources and expertise). *Cf. ILL. ANN. STAT.* ch. 34, para. 429.24; ch. 24, para. 11-42-8 (Smith-Hurd 1989) (additional franchises may not be granted on terms more favorable or less burdensome than the established franchise).

2. 1989 Cal. Legis. Serv. Ch. 700, sec. 3, at 2073 (West) (enacting CAL. GOV'T CODE § 53066.3(d)). Any new franchisee must also provide required public access identical to the established franchise. *Id. But cf.* Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1553-56 (N.D. Cal. 1987) (violation of First Amendment rights for a city ordinance to require operators to wire entire service area and to provide specified numbers and types of public access channels). *See generally* Ronka, *Cable TV: Preserving Public Access* 4 L.A. LAW. 8 (1981) (First Amendment issues pertaining to local cable television control).

3. CAL. GOV'T CODE § 53066.3(d) (amended by Chapter 413). Under Chapter 413, compliance with these requirements must occur in a timely and nondiscriminatory manner. *Id. See id.* § 53066.2 (West Supp. 1990) (unlawful to deny cable service to potential subscribers because of their income).

4. *Id.* § 53066.3(d) (amended by Chapter 413).

## **Business Associations and Professions; alcoholic beverage license applications**

Business and Professions Code §§ 23985.5, 24013, 24072.5 (amended).

AB 3612 (Frizzelle); 1990 STAT. Ch. 612

Sponsor: Department of Alcoholic Beverage Control

Support: Council on Alcohol Policy

Under existing law, applicants for a retail license<sup>1</sup> to sell<sup>2</sup> alcoholic beverages<sup>3</sup> must notify every resident within a 500-foot radius of the premises specified for the license application.<sup>4</sup> Under Chapter 612, notification to neighboring residents is required only if the license application is for a different retail license<sup>5</sup> or for premises that are not currently licensed.<sup>6</sup>

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1. See CAL. BUS. & PROF. CODE § 23024 (West 1985) (definition of retailer's on-sale license).

2. See *id.* § 23025 (definition of sell).

3. See *id.* § 23004 (definition of alcoholic beverage). See generally *id.* §§ 23330-24212 (West 1985 & Supp. 1990) (provisions governing restrictions, applications, issuance, transfers, and revocation of a license to sell alcoholic beverages).

4. *Id.* § 23985.5 (amended by Chapter 612). The applicant must submit proof to the Department of Alcoholic Beverages Control (Department) of compliance with California Business and Professions Code section 23985.5 prior to the approval of the license. *Id.* See *id.* §§ 23985-23988 (West 1985) (provisions governing notices and protests regarding a license to sell alcoholic beverages). See also 4 CAL. CODE REGS. §§ 55-68.6 (1990) (regulations of applications and licenses to sell alcoholic beverages).

5. See CAL. BUS. & PROF. CODE § 23320 (West Supp. 1990) (listing 36 different types of alcoholic beverage licenses that may be issued).

6. *Id.* § 23985.5 (amended by Chapter 612). Protests against the granting of an application must be filed within 30 days of the posting of the notice of intention to engage in the sale of alcoholic beverages at the premises, or within 30 days of the mailing of the notification, whichever is later. *Id.* § 24013 (amended by Chapter 612). See generally *Reimel v. Alcoholic Beverage Control Appeals Bd.*, 263 Cal. App. 2d 706, 711, 69 Cal. Rptr. 744, 747 (1968) (the Department's decision to accept protests and conduct a hearing, or to reject protests, issue license, and conduct a hearing, is not subject to review). Cf. MASS. GEN. LAWS ANN. ch. 138, § 17 (West Supp. 1990) (transfer of a license to sell alcoholic beverages is subject to a public hearing in the neighborhood where the license is to be relocated).

## Business Associations and Professions; alcoholic beverage retailers--transfers of property

Business and Professions Code § 25511 (repealed and new);  
§ 25503.27 (new).  
AB 3175 (Floyd); 1990 STAT. Ch. 425

Existing law prohibits a brewing industry manufacturer, wholesaler,<sup>1</sup> or importer<sup>2</sup> from giving or selling equipment or supplies, other than alcoholic beverages,<sup>3</sup> to any person operating or owning an on-sale premises.<sup>4</sup> Under Chapter 425, a manufacturer, winegrower, rectifier,<sup>5</sup> distiller, bottler, importer, or wholesaler may provide food and beverages for consumption at a business meeting.<sup>6</sup> Tickets, food, beverages, and local ground transportation may also be provided for athletic activities and other forms of entertainment.<sup>7</sup>

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1. See CAL. BUS. & PROF. CODE § 23021 (definition of wholesaler).

2. See *id.* § 23017 (definition of importer).

3. See *id.* § 23004 (definition of alcoholic beverage).

4. *Id.* § 25501(a). *Cf. id.* § 25600 (West Supp. 1990) (no licensee may give a gift in connection with the sale or distribution of any alcoholic beverage except as provided by the Department of Alcoholic Beverage Control (Department)); 4 CAL. CODE REGS. § 106(a) (1986) (no licensee is allowed to give a premium, gift, or good in connection with the distribution of alcoholic beverages). See *California Beer and Wine Wholesalers Assoc., Inc. v. Department of Alcoholic Beverage Control*, 201 Cal. App. 3d 100, 101-02, 247 Cal. Rptr. 60, 61 (1988) (regulation permitting the gift of advertising specialties not exceeding \$50 per brand, per year, to a retailer was invalid); *Miller Brewing Co. v. Court of Appeal*, 204 Cal. App. 3d 5, 15, 250 Cal. Rptr. 845, 851 (1988) (the Department has authority to prohibit a brewer from donating promotional tickets and jackets displaying brewer's name and products, since the donation constitutes gifts in connection with the distribution of alcoholic beverages). See also CAL. BUS. & PROF. CODE § 2336 (West 1985) (definition of on-sale license).

5. See CAL. BUS. & PROF. CODE § 23016 (definition of rectifier).

6. *Id.* § 25503.27(a)(1) (enacted by Chapter 425). Local ground transportation to and from the meeting can also be provided. *Id.*

7. *Id.* § 25503.27(a)(2) (enacted by Chapter 425). See DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, BULLETIN, (May 30, 1990) (copy on file at the *Pacific Law Journal*) (existing law prior to the adoption of Chapter 425, did not comply with Department policy of allowing reasonable entertainment). A portion of this expenditure must be deductible as a business entertainment expense under the Internal Revenue Code. CAL. BUS. & PROF. CODE § 25503.27(b) (enacted by Chapter 425). See generally I.R.C. § 274(a) (West Supp. 1990) (generally there is no deduction for entertainment expenses unless the expense was a substantial and bona fide business discussion).

Chapter 425 also creates an exception to existing law by allowing a beer manufacturer to provide supplies to a retailer<sup>8</sup> when a retailer's equipment or supplies are lost or damaged as a result of a natural disaster.<sup>9</sup>

*JSB*

## **Business Associations and Professions; asbestos consultants**

Business and Professions §§ 7180, 7180.5, 7181, 7182, 7183, 7183.5, 7184, 7185, 7187, 7189, 7189.5, 7189.7 (new); Labor Code §§ 9021.6, 9021.8 (new); § 9021.5 (amended).  
SB 732 (Beverly); 1990 STAT. Ch. 1255

Existing law provides for registration and certification of contractors who work with asbestos.<sup>1</sup> Chapter 1255 requires asbestos consultants<sup>2</sup> and site surveillance technicians<sup>3</sup> to also

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8. See CAL. BUS. & PROF. CODE § 23023 (West 1985) (definition of retailer).

9. *Id.* § 25511 (enacted by Chapter 425). Chapter 425 only applies if the premises of the retailer is within an area declared to be in a state of disaster by the governor. *Id.* The transaction must occur within six weeks of the declaration of a state of disaster. *Id.* See CAL. GOV'T CODE § 8680.3 (West Supp. 1990) (definition of natural disaster).

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1. CAL. LAB. CODE § 6501.5(a)(1) (West 1989). See *id.* §§ 6501.7 (definition of asbestos); 6501.8 (definition of asbestos-related work), 7058.5 (procedure for asbestos contractor certification). See also 8 CAL. CODE REGS § 341.6 (1990) (implementation of registration regulations for asbestos contractors). Cf. 15 U.S.C. § 2646 (1990) (federal procedures for certifying contractors who work with asbestos). See generally ASSEMBLY OFFICE OF RESEARCH, PUB NO. 0197-A, WILL WE LOSE THE WAR AGAINST ASBESTOS IN BUILDINGS? (1988) (a critical discussion of the ineffective asbestos removal practices in California and a comparison of federal law).

2. See CAL. BUS. & PROF. CODE § 7181 (enacted by Chapter 1255) (an asbestos consultant provides services in building inspection, asbestos abatement, program design, and supervision of site surveillance technicians).

3. See *id.* § 7182 (enacted by Chapter 1255) (definition of site surveillance technician as a site supervisor working on behalf of an asbestos consultant).

receive certification from the California Division of Occupational Safety and Health (Cal-OSHA).<sup>4</sup>

Existing law directs Cal-OSHA to propose regulations to protect the health of employees who work with asbestos.<sup>5</sup> Chapter 1255 further requires Cal-OSHA to propose specific regulations for certifying asbestos consultants and site surveillance technicians.<sup>6</sup> Chapter 1255 also requires all asbestos consultant and site surveillance technician certifications to be renewed annually.<sup>7</sup>

Under Chapter 1255, Cal-OSHA must follow specific guidelines when issuing certificates.<sup>8</sup> Chapter 1255 prohibits asbestos consultants and site surveillance technicians from having any financial interest in the operations of contractors hired to abate

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4. *Id.* § 7180 (enacted by Chapter 1255). Certifications are subject to the regulations of section 9021.5(b) of the California Labor Code. *Id.* Violators of the provisions of Chapter 1255 are subject to a fine, imprisonment, and loss of certification. *Id.* § 7189 (enacted by Chapter 1255). After July 1, 1992, building managers utilizing the services of asbestos consultants or site surveillance technicians must contract with persons who are certified by Cal-OSHA. *Id.* § 7180.5 (enacted by Chapter 1255). *Cf.* CONN. GEN. STAT. ANN. § 20-440 (West 1989) (requires asbestos abatement consultants to be trained and certified).

5. CAL. LAB. CODE § 9021.5(a) (amended by Chapter 1255).

6. *Id.* § 9021.5(b) (amended by Chapter 1255). Cal-OSHA must propose regulations to the Occupational Safety and Health Standards Board that enumerate procedures to meet the certification requirements of Chapter 1255, including writing the examination to be used. *Id.* Cal-OSHA may contract with outside organizations to prepare and administer examinations. *Id.* § 9021.5(b)(2) (amended by Chapter 1255). Cal-OSHA is permitted to charge a fee to cover certification expenses. *Id.* § 9021.6 (enacted by Chapter 1255).

7. *Id.* § 9021.8 (enacted by Chapter 1255). Cal-OSHA must require asbestos consultants and site surveillance technicians to take annual refresher courses and recertification examinations. *Id.* § 9021.8 (enacted by Chapter 1255).

8. CAL. BUS. & PROF. CODE § 7183(a) (enacted by Chapter 1255). Certificates must be issued by Cal-OSHA within 45 days from completion of an application. *Id.* Cal-OSHA may revoke certificates obtained or used illegally. *Id.* § 7183.5 (enacted by Chapter 1255). Asbestos consultants qualify for a certificate once the applicant has satisfied all of the following criteria: (1) Either one year of asbestos related experience and a specified bachelor of science degree, or two years of asbestos related experience and a bachelor's degree, or three years of experience and a specified associate of arts degree, or four years of experience and a high school diploma; (2) a valid federal certificate for the type of work performed; and (3) passed an examination administered by Cal-OSHA that tests for specific safety related issues. *Id.* § 7184(a)-(c) (enacted by Chapter 1255). Site surveillance technicians must have six months experience under the supervision of an asbestos consultant and a high school diploma, and must have passed a Cal-OSHA administered exam covering specified safety related topics. *Id.* § 7185(a)-(c) (enacted by Chapter 1255).

asbestos.<sup>9</sup> Chapter 1255 also requires employees charged with operating state buildings to be certified as asbestos consultants.<sup>10</sup>

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## **Business Associations and Professions; attorneys**

Business and Professions Code § 6089 (repealed); § 6086.7 (repealed and new); §§ 6148, 6201, 6203 (amended).  
SB 2066 (Davis); 1990 STAT. Ch. 483

Prior law allowed a court to report to the State Bar any attorney found guilty of contempt if the contempt holding involved grounds warranting attorney discipline.<sup>1</sup> Chapter 483 requires a court to report to the State Bar any final order of contempt imposed against an attorney that may involve grounds warranting discipline.<sup>2</sup> Chapter 483 also requires a court to report to the State Bar any judgment reversed or modified due to an attorney's misconduct, incompetent representation, or willful misrepresentation.<sup>3</sup>

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9. *Id.* § 7187 (enacted by Chapter 1255). *See* CAL. LAB. CODE § 6501.8 (West 1989) (definition of asbestos abatement).

10. CAL. BUS. & PROF. CODE § 7189.7(a) (enacted by Chapter 1255). Where possible, Chapter 1255 also requires the state to establish civil service classifications of associate or senior industrial hygienists to correspond with the requirements of an asbestos consultant and a site surveillance technician. *Id.* Attorneys advising building managers on asbestos related matters are exempt from the provisions of Chapter 1255. *Id.* § 7189.7(b) (enacted by Chapter 1255).

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1. 1982 Cal. Stat. ch. 181, sec. 1, at 599 (enacting CAL. BUS. & PROF. CODE § 6086.7) (repealed by Chapter 483). Under prior law, a court was required to report to the State Bar any reversal of judgment based upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney. 1986 Cal. Stat. ch. 1114, sec. 8, at 3917 (enacting CAL. BUS. & PROF. CODE § 6089) (repealed by Chapter 483). The court was also required to notify the State Bar of the imposition of specified judicial sanctions against an attorney. *Id.*

2. CAL. BUS. & PROF. CODE § 6086.7(a) (enacted by Chapter 483).

3. *Id.* § 6086.7(b) (enacted by Chapter 483). The court must also notify the State Bar of the imposition of specified judicial sanctions. *Id.* § 6086.7(c) (enacted by Chapter 483). *See* *People v. Pope*, 23 Cal. 3d 412, 425-26, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979) (definition of incompetent representation); *Coombs v. State Bar of Cal.*, 49 Cal. 3d 679, 686, 779 P.2d 298, 301, 262 Cal. Rptr. 554, 557 (1989) (definition of willful misrepresentation). *See also* *People v. Ryner*, 164 Cal. App. 3d 1075, 1087, 211 Cal. Rptr. 140, 148 (1985) (holding that although prosecutor's

Existing law dictates the procedures and requirements for billings rendered by an attorney to a client.<sup>4</sup> Chapter 483 requires client billings to clearly describe the costs, expenses, and amounts of costs and expenses incurred by the attorney.<sup>5</sup>

Existing law establishes an arbitration system<sup>6</sup> for attorney and client fee disputes.<sup>7</sup> Chapter 483 forbids an attorney from filing a small claims action for recovery of fees or costs after the client has filed a request for arbitration.<sup>8</sup> Chapter 483 further specifies that

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misconduct reflected poor judgment and was unprofessional, the attorney's misconduct did not prejudice defendant). The court must view the cumulative effect of the misconduct before determining whether the misconduct significantly impacted the outcome of the case. *Id.* However, the court may exercise its power to discipline attorneys and to report an attorney's misconduct to the State Bar even if the case is not reversed due to the misconduct. *Id.* at 1075 n.5, 211 Cal. Rptr. at 148 n.5.

4. CAL. BUS. & PROF. CODE § 6148(b) (amended by Chapter 483). Under existing law, an attorney must provide the client with a bill no later than 10 days from the date of a client's demand for a bill. *Id.* Chapter 483 exempts from this provision any attorney that bills on a regular monthly schedule. *Id.* See generally Lester, *No Man is an Island: A Compendium of Legal Issues Confronting Attorneys When Individual Defendants are Named in an Employment Litigation Complaint*, 20 PAC. L.J. 293, 295-97 and Appendix A (1989) (fee agreement requirements and sample fee agreement letter).

5. CAL. BUS. & PROF. CODE § 6148(b) (amended by Chapter 483).

6. See generally *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 706, 552 P.2d 1178, 1182, 131 Cal. Rptr. 882, 886 (1976) (observing that arbitration has become an accepted and favored method of resolving disputes); Martin, *Suing the Client*, 6 CAL. LAW., Feb. 1986, at 23 (noting that arbitration under the auspices of the State Bar and local bar association is the most common way to collect disputed fees in California).

7. See CAL. BUS. & PROF. CODE §§ 6200 (amended by 1990 Cal. Stat. ch. 1020, sec. 2, pg. \_\_\_\_); 6201 (amended by Chapter 483); 6202 (West 1990); 6203 (amended by Chapter 483); 6204-6206 (West 1990). An attorney must provide a client with a written notice of the client's right to arbitrate before the attorney may file an action to recover fees and costs. *Id.* § 6201(a) (amended by Chapter 483). But cf. *Aheroni v. Maxwell*, 205 Cal. App. 3d 284, 294-95, 252 Cal. Rptr. 369, 374-75 (1988) (holding that failure to give notice of right to arbitration does not deprive a court of its jurisdiction over the attorney's action to recover fees; the burden is on the client to move for dismissal based on the attorney's failure to give the required notice). See generally Hargarten & Ardisson, *Fine Tuning California's Mandatory Attorney Fee Arbitration Statute*, 16 U.S.F. L. REV. 411 (1982) (critical evaluation of California's mandatory fee dispute arbitration legislation).

8. CAL. BUS. & PROF. CODE § 6201(b) (amended by Chapter 483). See *Meis and Waite v. Parr*, 654 F. Supp. 867, 869 (N.D. Cal. 1987) (finding that plaintiff law firm violated the intent of the California arbitration statutes by pursuing both arbitration and litigation simultaneously). Cf. *Manatt, Phelps, Rothenberg & Tunney v. Lawrence*, 151 Cal. App. 3d 1165, 1171-72, 199 Cal. Rptr. 246, 249-50 (1984) (holding that once a client has requested and begun arbitration, the client may not unilaterally withdraw from the arbitration proceeding by filing a complaint against the attorney in court); *Loeb & Loeb v. Beverly Glen Music, Inc.*, 166 Cal. App. 3d 1110, 1116-18, 212 Cal. Rptr. 830, 834-35 (1985) (holding that trial court has discretion to lift a stay of the judicial proceedings in whole or in part). A stay order may be inapplicable to an attachment remedy if the attachment proceeding is not amenable to arbitration. *Id.*



arbitration awards must not include an award to either party for attorney's fees incurred for the arbitration.<sup>9</sup>

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## **Business Associations and Professions; attorneys--arbitration of fee disputes**

Business & Professions Code § 6200 (amended).

AB 2682 (Moore); 1990 STAT. Ch. 1020

Support: State Bar of California; L.A. County Bar Association

Existing law requires the Board of Governors of the State Bar (Board)<sup>1</sup> to regulate the arbitration of attorney fee disputes.<sup>2</sup> Prior law allowed the Board to provide for one lay member on any three-member arbitration panel.<sup>3</sup> Chapter 1020 requires one member of the three-member arbitration panel to be a lay member at the option of the client.<sup>4</sup> Chapter 1020 also allows a client to require that one of the arbitration panel members be an attorney whose area of practice is either civil or criminal law.<sup>5</sup>

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9. CAL. BUS. & PROF. CODE § 6203(a) (amended by Chapter 483). However, attorney's fees may be awarded by a court confirming, correcting, or vacating an arbitration award for the fees incurred in obtaining confirmation, correction, or vacation. *Id.* § 6203(c) (amended by Chapter 483). A party that seeks a trial after an arbitration award and prevails at trial may also be entitled to attorney's fees incurred for the trial after arbitration. *Id.* § 6204(d) (West 1990).

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1. See CAL. BUS. & PROF. CODE § 6010 (West 1990) (powers and duties of the Board of Governors).

2. *Id.* § 6200(a) (amended by Chapter 1020).

3. 1989 Cal. Legis. Serv. ch. 1416, sec. 1, at 5319 (amending CAL. BUS. & PROF. CODE § 6200) (amended by Chapter 1020).

4. CAL. BUS. & PROF. CODE § 6200(e)(1) (amended by Chapter 1020).

5. *Id.* § 6200(e)(1) (amended by Chapter 1020). Under Chapter 1020, if the panel is composed of one member, the client may choose to have that member be an attorney practicing in either civil or criminal law. *Id.* § 6200(e)(2) (amended by Chapter 1020).

## **Business Associations and Professions; attorneys--contingent fees**

Business and Professions Code § 6147.5 (new).

SB 2606 (Torres); 1990 STAT. Ch. 713

Under existing law, any attorney that contracts to represent a client on a contingent fee basis must provide a duplicate copy of the contract to that client.<sup>1</sup> Chapter 713 creates an exception to existing law for contingent fee contracts that pertain to recovery of certain claims between merchants<sup>2</sup> that have at least ten employees.<sup>3</sup> If there is no written contract for legal services as permitted by Chapter 713, an attorney may not contract for or collect a contingent fee beyond specified limits.<sup>4</sup>

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1. CAL. BUS. & PROF. CODE § 6147(a) (West 1990). A duplicate copy of the contingent fee contract must be provided at the time that the client enters into the contract. *Id.* Existing law allows an exception for contingent fee contracts that concern recovery under workers' compensation. *Id.* § 6147(c). Existing law also specifies certain provisions that must be included in a contingent fee contract. *Id.* §§ 6147(a), 6148(a). Existing law also limits contingent fees in medical malpractice cases. *Id.* § 6146.

2. See CAL. COMM. CODE § 2104 (West Supp. 1990) (definition of merchant).

3. CAL. BUS. & PROF. CODE § 6147.5(a) (enacted by Chapter 713). Chapter 713 applies to claims pertaining to the sale or lease of goods or services, or funds loaned for use in the conduct of a business or profession. *Id.*

4. *Id.* § 6147.5(b) (enacted by Chapter 713). The contingent fee may not exceed 20% of the first \$300 collected, 18% of the next \$1,700 collected, and 13% of sums in excess of \$2,000. *Id.* Certain minimum charges are permitted by Chapter 713. See *id.* § 6147.5(b)(2) (enacted by Chapter 713).

## Business Associations and Professions; attorneys-- work product

Civil Procedure Code § 585.1 (new); § 2018 (amended).  
SB 2668 (Presley); 1990 STAT. Ch. 207

Under existing law, any writings that reflect the impressions, conclusions, opinions, or legal research of an attorney are generally not discoverable.<sup>1</sup> Under Chapter 207, no attorney work product privilege exists in any malpractice action brought by a former client against the attorney if the work product is relevant to an issue of breach of the attorney's duty.<sup>2</sup>

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1. CAL. CIV. PROC. CODE § 2018(c) (amended by Chapter 207). All other forms of attorney work product may be discoverable if a court determines that denial of discovery would unfairly prejudice the party seeking discovery or would result in an injustice. *Id.* § 2018(b) (amended by Chapter 207). If disciplinary actions are pending against an attorney, the State Bar may discover any attorney work product that is relevant to the issues of breach of a duty. *Id.* § 2018(e) (amended by Chapter 207). However, an attorney has a fifth amendment right to refuse to provide the State Bar with documents or testimony which would subject the attorney to potential criminal liability. *Black v. State Bar of California*, 7 Cal. 3d 676, 688, 499 P.2d 968, 974-75, 103 Cal. Rptr. 288, 294-95 (1972). *See Note, Administration of Justice*, 37 CAL. ST. B.J. 585, 586-88 (1962) (recommending amendments that would permit the discovery of attorney work product on a determination that denial of discovery would result in an injustice). *See also Review of Selected 1987 California Legislation*, 20 PAC. L.J. 451, 452-54 (1988) (review of disciplinary proceedings for attorney misconduct). *Cf. FED. R. CIV. P. 26(b)(3)* (attorney work product discoverable upon a showing of substantial need and an inability to obtain the materials elsewhere, but requiring the court to protect against the discovery of mental impressions, conclusions, opinions, and legal theories).

2. CAL. CIV. PROC. CODE § 2018(f) (amended by Chapter 207). Prior law was unclear whether opinion work product was absolutely privileged in a malpractice action. *Compare Neeb v. Superior Court*, 214 Cal. App. 3d 693, 693, 262 Cal. Rptr. 887, 887 (1989), *review dismissed and remanded*, \_\_\_ Cal. 3d \_\_\_, 795 P.2d 782, 272 Cal. Rptr. 612 (1990) (in an attorney malpractice action, documents representing opinion work product were absolutely privileged) *with Platt v. Superior Court*, 214 Cal. App. 3d 779, 781, 263 Cal. Rptr. 32, 33 (1989), *review dismissed and remanded*, \_\_\_ Cal. 3d \_\_\_, 795 P.2d 782, 272 Cal. Rptr. 613 (1990) (California Civil Code section 2018(c) was never intended to shield an attorney's work product when an attorney's own client sues for malpractice). *See also Lasky v. Superior Court*, 172 Cal. App. 3d 264, 278, 218 Cal. Rptr. 205, 213 (1985) (attorney holds the work product privilege and may even assert it against the client); *and Travelers Ins. Co. v. Superior Court*, 143 Cal. App. 3d 436, 453, 181 Cal. Rptr. 871, 882 (1983) (in an attorney malpractice action, opinion work product is absolutely privileged, and the determination of absolute privilege is to be made on an item-by-item basis).

Existing law allows entry of a default judgment in civil actions after a written application by the plaintiff against any defendant who has been properly served and fails to respond.<sup>3</sup> Chapter 207 requires a plaintiff's application to enter default judgment to include an affidavit stating that a copy of the application has been mailed to the party claimed to be in default, and to that party's attorney.<sup>4</sup> Under Chapter 207, a default judgment takes effect ten days after the filing of the application to enter default, unless the party claimed to be in default pleads or otherwise defends the action within those ten days.<sup>5</sup>

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3. CAL. CIV. PROC. CODE § 585 (West Supp. 1990). Existing law requires an affidavit to be filed with the application to enter default judgment, stating that a copy of the application has been mailed to the attorney of the defendant, or if there is no attorney, to the defendant at the defendant's last known address. *Id.* § 587. *See Slusher v. Durr*, 69 Cal. App. 3d 747, 755, 138 Cal. Rptr. 265, 270 (1977) (California Code of Civil Procedure section 587 is designed to prevent the taking of default against an unwary litigant and creates a duty for a reasonably diligent search for the last known mailing address).

4. CAL. CIV. PROC. CODE § 585.1 (enacted by Chapter 207). Chapter 207 does not create an affirmative duty to determine the existence or identity of counsel representing the party claimed to be in default. *Id.* § 585.1(2) (enacted by Chapter 207). *Cf. id.* § 587 (West Supp. 1990) (plaintiff's application to enter default judgment is required to include an affidavit stating that a copy of the application has been mailed to defendant when the party requesting default knows the whereabouts of the party to be placed in default).

5. *Id.* § 585.1(b)-(c) (enacted by Chapter 207).

## **Business Associations and Professions; automated teller machines**

Financial Code §§ 13000, 13020, 13030, 13031, 13040, 13041, 13050, 13051, 13060, 13070 (new).  
AB 244 (Calderon); 1990 STAT. Ch. 825

Existing law regulates the location and operation of automated teller machines (ATM's).<sup>1</sup> Under Chapter 825, operators<sup>2</sup> or lessors that control<sup>3</sup> the ATM access area<sup>4</sup> or the defined parking area<sup>5</sup> are required to provide lighting during hours of darkness.<sup>6</sup> Chapter 825 additionally requires the operators of ATM's to provide information regarding basic safety precautions to be exercised when using an ATM.<sup>7</sup> Specified ATM's located within buildings are exempt from the provisions of Chapter 825.<sup>8</sup>

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1. See CAL. FIN. CODE §§ 550-559 (West 1989). See also *id.* § 13020(c) (enacted by Chapter 825) (definition of automated teller machine). Cf. § 550(a) (similar definition of automated teller machine).

2. See *id.* § 13020(i) (enacted by Chapter 825) (definition of operator).

3. See *id.* § 13020(e) (enacted by Chapter 825) (definition of control).

4. See *id.* § 13020(a) (enacted by Chapter 825) (definition of access area).

5. See *id.* § 13020(g) (enacted by Chapter 825) (definition of parking area).

6. *Id.* § 13041 (enacted by Chapter 825). These requirements are optional for operators of existing ATM's until mandatory compliance begins on July 1, 1993. *Id.* ATM's installed on or after July 1, 1991 must comply upon installation. *Id.* See *id.* § 13041 (enacted by Chapter 825) (specific lighting requirements). See also *id.* § 13020(h) (enacted by Chapter 825) (definition of hours of darkness).

7. *Id.* § 13050 (enacted by Chapter 825). This information must be provided to customers that have received access devices. *Id.* See *id.* §§ 13020(b) (enacted by Chapter 825) (definition of access device); 13020(f) (enacted by Chapter 825) (definition of customer).

8. *Id.* § 13060 (a), (b) (enacted by Chapter 825). Also exempted are ATM's located in any area which is not controlled by the operator. *Id.* § 13060(c) (enacted by Chapter 825).

## **Business Associations and Professions; bulk sales**

Commercial Code §§ 6106, 6107, 6109, 6110, 6111 (repealed); 6101, 6102, 6103, 6105, 6106.1, 6107, 6110, 6111 (repealed and new); §§ 6106.2, 6106.4, 6108 (new); § 1105 (amended).

AB 3653 (Harris); 1990 STAT. Ch. 1191

Source: California Commission on Uniform State Laws

Support: Business Law Section of the State Bar, Credit Managers Association of California

Prior law regulated bulk transfers<sup>1</sup> by requiring the transferee to give specified notice of the transfer to the transferor's creditors.<sup>2</sup> Failure to give the appropriate notice rendered the bulk transfer fraudulent and void against any creditor of the transferor.<sup>3</sup>

Chapter 1191 regulates bulk sales.<sup>4</sup> Failure of a transferee to comply with the notice provisions and other requirements of Chapter 1191 does not affect the transferee's title to the property,

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1. See 1979 Cal. Stat. ch. 294, sec. 1, at 1094 (amending CAL. COM. CODE § 6102) (repealed and enacted by Chapter 1191) (definition of bulk transfer included a transfer in bulk, not in the ordinary course of business, of a substantial part of the inventory of specified businesses).

2. 1979 Cal. Stat. ch. 294, sec. 6, at 1095 (amending CAL. COM. CODE § 6105) (repealed and enacted by Chapter 1191). See *id.* at 1098 (amending CAL. COM. CODE § 6107) (repealed and enacted by Chapter 1191) (notice provisions). See also *id.* at 1094 (amending CAL. COM. CODE § 6102) (repealed and enacted by Chapter 1191) (enterprises subject to the bulk transfer laws included businesses whose a principal place of business was the site of the sale of merchandise).

3. *Id.* at 1095 (amending CAL. COM. CODE § 6105) (repealed and enacted by Chapter 1191).

4. See CAL. COM. CODE §§ 6101-6111 (enacted by Chapter 1191). See *id.* § 6102(a)(3)(ii) (enacted by Chapter 1191) (definition of bulk sale includes a sale not in the ordinary course of the seller's business of more than half of the seller's inventory and equipment). Chapter 1191 also defines a bulk sale to include a sale by auction, or a sale or series of sales by a liquidator not in the ordinary course of business, of more than half of the seller's inventory. *Id.* § 6102(a)(3)(i).

but makes any non-complying transferee liable to a creditor for damages.<sup>5</sup>

WTB

## **Business Associations and Professions; clinical laboratories**

Business and Professions Code §§ 1220, 1300 (amended).  
AB 4352 (Tanner); 1990 STAT. Ch. 970

Existing law provides for the regulation and licensing of clinical laboratories,<sup>1</sup> except for clinical laboratories operated by a licensed physician and surgeon or a podiatrist who performs work on the licensee's own patients.<sup>2</sup> Existing law requires all licensed clinical laboratories to maintain records, equipment, and facilities that adequately reflect the services rendered and to perform satisfactorily in a proficiency testing program approved by the Department of Health Services (Department).<sup>3</sup>

Under Chapter 970, the Department must inspect licensed clinical laboratories every two years.<sup>4</sup> The Department must also develop regulations to assure that testing done in clinical

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5. *Id.* § 6107(a) (enacted by Chapter 1191). The notice requirements enacted by Chapter 1191 include stating the name and address of the transferor, the location and description of the assets, and the date of the sale. *Id.* § 6105(a) (enacted by Chapter 1191). At least 12 business days before the date of the bulk sale, the transferee must publish the notice in a newspaper of general circulation and record the notice in the county where the tangible assets are located. *Id.* § 6105(b) (enacted by Chapter 1191). *Cf.* THE AMERICAN LAW INSTITUTE AND NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE - REPEALER OF ARTICLE 6 - BULK TRANSFERS AND [REVISED] ARTICLE 6 - BULK SALES, (1988) (the Bulk Sales Act is designed to increase protection of creditors while minimizing the obstructions to good-faith transactions).

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1. See CAL. BUS. & PROF. CODE § 1206(a)(3) (West 1990) (definition of clinical laboratories).

2. *Id.* § 1241(b).

3. *Id.* § 1220(a) (amended by Chapter 970). See CAL. HEALTH & SAFETY CODE §§ 200-223 (West 1990) (powers and duties of the Department of Health Services).

4. CAL. BUS. & PROF. CODE § 1220(b) (amended by Chapter 970).

laboratories exempted from licensure will meet basic quality requirements.<sup>5</sup> Chapter 970 requires any person who operates an exempt clinical laboratory to register with the Department prior to conducting any laboratory tests.<sup>6</sup>

*UOR*

## **Business Associations and Professions; clinical social workers corporations--names**

Business and Professions Code § 4998.3 (amended).  
AB 2574 (Lancaster); 1990 STAT. Ch. 334

Prior law required a licensed<sup>1</sup> clinical social workers corporation<sup>2</sup> name to contain the names of one or more corporate shareholders.<sup>3</sup> Existing law requires a clinical social workers corporation name to indicate corporate existence.<sup>4</sup> Chapter 334 allows a licensed clinical social workers corporation to operate under a fictitious name.<sup>5</sup> However, Chapter 334 prohibits a

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5. *Id.* § 1220(c) (amended by Chapter 970). Chapter 970 also requires non-licensed clinical laboratories to meet the regulations of California Business and Professions Code section 1220. *Id.* § 1220(a) (amended by Chapter 970). The non-licensed clinical laboratories must also comply with proficiency testing requirements. *Id.* § 1220(c) (amended by Chapter 970).

6. *Id.* § 1220(d) (amended by Chapter 970). The person registering must provide the Department with the name and address of the business or operator, a list of all equipment used for tests in the laboratory, and a list of the tests to be performed in the laboratory. *Id.*

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1. *See* CAL. BUS. & PROF. CODE § 4996.2 (West Supp. 1990) (licensing requirements).

2. *See id.* § 4998 (definition of licensed clinical social workers corporation).

3. 1985 Cal. Stat. Ch. 820, sec. 1, at 754 (enacting CAL. BUS. & PROF. CODE § 4998.3).

4. CAL. BUS. & PROF. CODE § 4998.3 (amended by Chapter 334). An indication of corporate existence must also include use of the title "licensed clinical social workers". *Id.*

5. *Id.* Before rendering treatment, the corporation must inform the patient that the business is being conducted by a licensed clinical social workers corporation. *Id.*



licensed social workers corporation from choosing a fictitious name that is false, misleading, or deceptive.<sup>6</sup>

GWA

## **Business Associations and Professions; commodities brokers--disciplinary action**

Corporations Code §§ 25212, 25213, 25232, 25232.1 (amended).

SB 1762 (Vuich); 1990 STAT. Ch. 323

Sponsor: Senate Commission on Corporate Governance,  
Shareholder, Rights and Securities Transactions

Support: California Cattlemen's Association

Existing law permits the Commissioner of Corporations<sup>1</sup> to censure, suspend, deny, or revoke the license of a securities broker-dealer<sup>2</sup> or an investment advisor<sup>3</sup> for specified violations.<sup>4</sup> Chapter 323 extends existing law to include certain violations

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6. *Id.* Cf. CAL. CORP. CODE §§ 13409 (West 1989) (general requirements for professional corporation names); 201(b) (West Supp. 1990) (general requirements for names of a corporation); CAL. BUS. & PROF. CODE § 4987.8 (West Supp. 1990) (counseling corporation names). *See generally* Note, *Corporations: Right to Exclusive Use of Corporate Name*, 28 CALIF. L. REV. 766, (1940) (summarizing cases interpreting the false, misleading or deceptive limitations upon corporate names).

1. *See* CAL. CORP. CODE §§ 25005, 29501 (West Supp. 1990) (appointment, salary, tenure, and oath of commissioner); 25600 (powers and duties of commissioner).

2. *See id.* § 25004 (West 1977) (definition of broker-dealer).

3. *See id.* § 25009 (definition of investment advisor).

4. *See id.* §§ 25212, 25213, 25232, 25232.1 (amended by Chapter 323). Violations include, but are not limited to, false statements made to the commissioner, conviction of crimes or civil liability involving moral turpitude, and being enjoined by a court from participating in the sale of securities. *Id.* §§ 25212(a)-(c) (amended by Chapter 323). *See* 10 CAL. CODE REGS. § 260.211.3 (1989) (regulations regarding waiver, denial, or revocation of license certificate). Cf. 1979 Cal. Stat. ch. 452, sec. 2, at 1596 (repealing CAL. CORP. CODE §§ 29500-29592) (prior law regulating commodity advisors).

relating to commodities transactions.<sup>5</sup>

RWL

## **Business Association and Professions; commodities transactions**

Corporations Code §§ 29500, 29501, 29502, 29503, 29504, 29505, 29506, 29507, 29508, 29509, 29510, 29511, 29512, 29513, 29514, 29515, 29516, 29520, 29530, 29531, 29532, 29535, 29536, 29537, 29540, 29541, 29542, 29543, 29544, 29545, 29546, 29550, 29551, 29552, 29553, 29554, 29555, 29560, 29561, 29562, 29563, 29564, 29565, 29566, 29570, 29571, 29572 (new).

AB 4254 (Johnston); 1990 STAT. Ch. 969

Support: Department of Corporations

*(Effective September 18, 1990)*

In 1974, Congress enacted the Commodity Futures Trading Commission Act (Act)<sup>1</sup> and specifically preempted state regulation

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5. CAL. CORP. CODE §§ 25212, 25213, 25232, 25232.1 (amended by Chapter 323). Officers, directors, partners, or employees of licensed investment advisors are also subject to disciplinary actions of the commissioner. *Id.* § 25232.1 (amended by Chapter 323). *See* Flaxman v. Commodity Futures Trading Comm'n, 697 F.2d 782, 786 (7th Cir. 1983) (failure of applicant to register with the Commodity Futures Trading Commission and to disclose previous suspension was grounds for revocation). *See generally* Miller, *Proprietary Activities of Securities Firms: Coping with the Conflicts*, 621 PLI/CORP 637 (1988) (exposure to regulatory and civil liability increases as proprietary activities of securities firms increase). *Cf.* 7 U.S.C. § 12a(2)-(4) (1988) (suspension of commodities dealers and associated persons); 17 C.F.R. § 3.55 (1990) (suspension and revocation of registration); WASH. REV. CODE ANN. § 21.30.350 (1989) (provisions for denial, suspension, revocation or limitation of commodity broker-dealer's license).

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1. 7 U.S.C.A. §§ 1-25 (West 1980 & Supp. 1990).

of all commodity<sup>2</sup> transactions.<sup>3</sup> In 1979, California repealed the California state commodity laws.<sup>4</sup>

With the relaxation of federal preemption regarding certain commodity transactions,<sup>5</sup> Chapter 969 enacts the California Commodity Law of 1990<sup>6</sup> to prohibit specified<sup>7</sup> commodity transactions.<sup>8</sup> Additionally, Chapter 969 requires commodity merchants<sup>9</sup> or telephonic sellers of a commodity or commodity

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2. See 7 U.S.C.A. § 2 (West Supp. 1990) (definition of commodity for purposes of the federal act). Cf. CAL. CORP. CODE § 29504 (enacted by Chapter 969) (definition of commodity).

3. 7 U.S.C.A. § 2 (West Supp. 1990). See also *id.* § 13a-2 (West 1980 & Supp. 1990) (amending the Act to allow states to bring suit to enforce the Act in federal court).

4. 1979 Cal. Stat. ch. 452, secs. 1-4, at 1596 (repealing CAL. CORP. CODE §§ 25106, 29500-592). See 1973 Cal. Stat. ch. 854, sec. 1, at 1525 (enacting CAL. CORP. CODE § 25106); 1969 Cal. Stat. ch. 1305, sec. 1, at 2630; 1973 Cal. Stat. ch. 854, secs. 3-7, 9.5, 10, 12-15, 19, 21, 31, 32, 34-36, 39-41, 45, 45.1, 46, 46.1, at 1526; 1974 Cal. Stat. ch. 865, secs. 5, 13, at 1839; 1975 Cal. Stat. ch. 362, sec. 4, at 808 (enacting CAL. CORP. CODE §§ 29500-29592) (provisions of the repealed California commodity laws).

5. See 7 U.S.C.A. § 16(e) (West Supp. 1990) (allowing state regulation of commodity transactions that are not conducted on or subject to the rules of a contract market). See also *id.* §§ 2a (designation of board of trade as a contract market); 2 (definition of board of trade).

6. See CAL. CORP. CODE § 29500 (enacted by Chapter 969). Cf. *Model State Commodity Code*, NORTH AMERICAN SEC. ADM'RS ASS'N REP. para. 4401-448 (CCH 1986) (model commodity code for state enactment to protect the public from commodity investments that have resulted in losses of millions of dollars nationwide).

7. See CAL. CORP. CODE §§ 29530(1)-(3), 29530(5), 29531(a) (enacted by Chapter 969) (exempts from regulation any commodity transaction within the regulatory jurisdiction of the federal Commodity Exchange Act). Chapter 969 further exempts from regulation: (1) Any commodity transactions by a financial institution; (2) commodity transactions by persons properly licensed to receive money for transmittal to foreign countries; and (3) commodity contracts for the purchase of a precious metal or foreign currency if the purchaser receives physical delivery of the precious metal or foreign currency within 28 calendar days from the date of payment of any portion of the purchase price. *Id.* §§ 29530(4), 29530(6), 29531(b) (enacted by Chapter 969). The Commissioner of Corporations is vested with powers to enforce the provisions of Chapter 969. *Id.* §§ 29540-29542 (enacted by Chapter 969). A commodity transaction not made in California is not subject to the provisions of Chapter 969 that make certain commodity transactions illegal. *Id.* § 29537 (enacted by Chapter 969). See *id.* § 29505 (enacted by Chapter 969) (definition of commodity contract).

8. CAL. CORP. CODE § 29520 (enacted by Chapter 969). Under Chapter 969, it is unlawful for any person offering to sell, purchase, or enter into a commodity transaction to willfully defraud any other person. *Id.* § 29536 (enacted by Chapter 969). See generally Harris, *You May Already Be A Victim of Fraud*, MONEY, Aug. 1989, at 74, 76 (discussing telemarketing fraud). According to the North American Securities Administrators Association, Americans lose \$10 billion per year to telephone con artists promoting everything from stocks and coins to dirt-pile mining schemes and art prints. *Id.* Cf. *Model Commodity Code*, NORTH AMERICAN SEC. ADM'RS ASS'N REP. para. 4403 (CCH 1986) (unlawful commodity activities).

9. See CAL. CORP. CODE § 29509 (enacted by Chapter 969) (definition of commodity merchant).

contract<sup>10</sup> to file a notice of transacting business with the Commissioner of Corporations.<sup>11</sup>

*NJH*

## **Business Associations and Professions; computer mapping licensing**

Business and Professions Code §§ 6731, 6731.1, 6735, 8726, 8761 (amended).  
AB 3395 (Eastin); 1990 STAT. Ch. 1226

Existing law requires civil engineers<sup>1</sup> to register with the State Board of Registration for Professional Engineers<sup>2</sup> in order to practice civil engineering.<sup>3</sup> Chapter 1226 broadens the definitions of civil engineering and land surveying<sup>4</sup> to include the creation, preparation or modification of electronic information performed in

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10. *See id.* § 29571(b) (enacted by Chapter 969) (definition of telephonic seller of a commodity or commodity contract). *See also id.* § 29571(d) (enacted by Chapter 969) (exceptions to definition of telephonic seller of a commodity or commodity contract).

11. *Id.* §§ 29570(a)(1), 29571(a)(1) (enacted by Chapter 969). In addition, Chapter 969 imposes fees on broker-dealers, commodity merchants, and telephonic sellers to support the programs established by Chapter 969. *See id.* § 25004 (West 1977) (definition of broker-dealer). *Cf. N.Y. GEN. BUS. LAW* § 359-e(14)(b) (McKinney Supp. 1990) (requiring registration of commodity broker-dealers, commodity salespersons, and commodity investment advisors). *See generally* Mihaly, Kauffman, *Regulation of the Sale of Commodities*, N.Y. GEN. BUS. LAW Supplementary Practice Commentaries (McKinney Supp. 1990) (New York legislature addressed commodity "boiler rooms" and the sale of commodities to the public by unregistered entities and individuals by enacting New York General Business Law section 359-e).

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1. *See CAL. BUS. & PROF. CODE* § 6702 (West Supp. 1990) (definition of civil engineer).

2. *See id.* § 6716 (authority of the Board to adopt rules and regulations).

3. *Id.* § 6730. *See id.* § 6731 (amended by Chapter 1226) (definition of civil engineering).

4. *See id.* § 8726 (amended by Chapter 1226) (definition of land surveying).

conjunction with civil engineering or land surveying.<sup>5</sup>

GWA

## **Business Associations and Professions; contractors**

Business and Professions Code § 7076 (repealed and new); §§ 7065.4, 7075.1, 7137.5 (new); §§ 7030, 7071.11, 7075, 7083 (amended).

AB 3480 (Mountjoy); 1990 STAT. Ch. 1326

Sponsor: Contractors' State License Board

Support: Associated General Contractors of California, Southern California Contractors Association, Builder's Exchanges Legislative Network, California Business Alliance

Existing law requires the Registrar of Contractors (Registrar)<sup>1</sup> to administer licensing procedures for contractors.<sup>2</sup> Chapter 1326 allows the Registrar to waive the trade examination requirement<sup>3</sup> for an applicant licensed as a contractor in another state if that state accepts California's qualifications for licensing contractors.<sup>4</sup>

Under existing law, any claim against a contractor's bond<sup>5</sup> must be brought within two years after the expiration of the contractor's

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5. *Id.* §§ 6731, 6731.1, 8726 (amended by Chapter 1226). *See id.* § 8701 (West Supp. 1990) (definition of land surveyor).

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1. *See* CAL. BUS. & PROF. CODE § 7011 (West 1975) (appointment and duties of the Registrar of Contractors).

2. *Id.* § 7084. The Registrar is empowered to adopt and promulgate rules and regulations necessary to carry out licensing duties. *Id.* *See* 16 CAL. CODE REGS. §§ 810-887 (1990) (rules and regulations for licensing contractors).

3. *See* CAL. BUS. & PROF. CODE § 7065.1 (West Supp. 1990) (circumstances for waiving written examination). *See* 16 CAL. CODE REGS. § 840 (1990) (requiring applicants to take written examination unless waived under section 7065.1 of the California Business and Professions Code).

4. CAL. BUS. & PROF. CODE § 7065.4 (enacted by Chapter 1326). The applicant must provide certification of licensure by another state and good standing with that state for at least five years. *Id.* The Contractors' State License Board must ascertain that the professional qualifications and conditions of good standing for licensure in the other state are the same as or greater than that of California. *Id.*

5. *See id.* § 7071.5 (West Supp. 1990) (requirements of a contractor's bond).

licensing period, or within two years after the deactivation of the contractor's license, whichever comes first.<sup>6</sup> Chapter 1326 requires a claim to be brought within two years after the expiration of the licensing period during which the act or omission occurred, or within two years of cancellation, inactivation or revocation of the contractor's license.<sup>7</sup> The requirements of Chapter 1326 also apply to claims made upon disciplinary bonds and deposits made in lieu of bonds.<sup>8</sup>

Existing law requires a contractor to notify the Registrar of any change in information<sup>9</sup> within ninety days of the change.<sup>10</sup> Under Chapter 1326, failure to notify the Registrar within ninety days causes the change to become effective on the date the notice is received at the board's headquarters office.<sup>11</sup>

*RWL*

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6. *Id.* § 7071.11(a) (amended by Chapter 1326). This limitation applies to all actions except by the an action by the contractor's employees to recover fringe benefits. *Id.*

7. *Id.* § 7071.11(a) (amended by Chapter 1326).

8. *Id.* § 7071.11(e)-(f). Any claim against a disciplinary bond must also be brought within two years after the last date that a disciplinary bond was required. *Id.* See *id.* § 7071.8 (West Supp. 1990) (requirements for disciplinary bond). See also *id.* § 7071.12; CAL. CIV. PROC. CODE §§ 995.710-995.770 (West Supp. 1990) (requirements for deposit in lieu of bond).

9. See 16 CAL. CODE REGS. § 863 (1990) (listing contractor information available to the public).

10. CAL. BUS. & PROF. CODE § 7083 (amended by Chapter 1326). But see *West v. State*, 181 Cal. App. 3d 753, 761, 227 Cal. Rptr. 16, 19 (1986) (Contractors' State Licensing Board has no duty to keep record of revocation of contractor's license).

11. CAL. BUS. & PROF. CODE § 7083 (amended by Chapter 1326). Failure to notify the Registrar within ninety days is also grounds for disciplinary action. *Id.* See *id.* § 7076 (repealed and enacted by Chapter 1326) (failure to notify Registrar of the death of a partner, dissolution of a partnership, or disassociation of a partnership is also grounds for disciplinary action).

## **Business Associations and Professions; currency transaction reporting requirements**

Revenue and Taxation Code §§ 18802.6 (amended and repealed and new); 26135 (new); Vehicle Code § 11713 (amended).

SB 2735 (Calderon); 1990 STAT. Ch. 1484

Under prior law, the Franchise Tax Board (FTB) could require a copy of a federal tax information return if federal law required a return regarding receipts of cash in a trade or business.<sup>1</sup> Under Chapter 1484, the FTB is required to obtain a copy of this return when filed.<sup>2</sup>

Under Chapter 1484, the attorney general may receive a copy of a federal tax return containing records of cash receipts in a trade or business.<sup>3</sup> Chapter 1484 also permits the attorney general to provide a duplicate of the return to a district attorney in certain circumstances.<sup>4</sup> The information obtained by the attorney general

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1. 1985 Cal. Stat. ch. 1461, sec. 69, at 5237 (enacting CAL. REV. & TAX. CODE § 18802.6 (a)(2)). See also 26 U.S.C. § 60501 (1988) (federal requirements for returns relating to cash received in trade or business).

2. CAL. REV. & TAX. CODE § 18802.6(d) (amended by Chapter 1484).

3. *Id.* § 18802.6(e) (amended by Chapter 1484). The attorney general must file a motion with the court and demonstrate an articulable suspicion that a person has committed a felony offense related to an information return. *Id.* See *Terry v. Ohio*, 392 U.S. 1, 31-33 (1968) (Harlan, J., concurring) (explanation of "articulable suspicion"). Compare CAL. REV. & TAX. CODE § 18802.6(e) (amended by Chapter 1484) with *id.* § 26453.2 (West Supp. 1990) (attorney general inspections of tax returns for tax administration issues). See generally Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987) (discussion of the drug war and its effect upon the Bill of Rights).

4. CAL. REV. & TAX. CODE § 18802.6(e) (amended by Chapter 1484). The district attorney must make a specific, written request to the attorney general stating the grounds upon which the district attorney bases a belief that the person has committed a felony offense related to an information return. *Id.* Cf. CAL. GOV'T. CODE § 7470 (West Supp. 1990) (requirements under the Right to Financial Privacy Act similar to those set forth in Chapter 1434, limiting the scope of the attorney general's power to obtain records in the interests of the individual's right to privacy).

or the district attorney must be treated as confidential, and must be used for investigative or prosecutorial purposes only.<sup>5</sup>

GWA

## **Business Associations and Professions; designer professionals' lien**

Civil Code §§ 3081.1, 3081.2, 3081.3, 3081.4, 3081.5, 3081.6, 3081.7, 3081.8, 3081.9, 3081.10 (new).

AB 1789 (Cortese); 1990 STAT. Ch. 1615

Source: California Council of the American Institute of Architects, California Council of Civil Engineers and Lane Surveyors, California Land Surveyors Association.

Support: American Institute of Architects.

Opposition: California Association of Realtors, Department of Consumer Affairs.

Existing law specifies that certain persons are entitled to a mechanic's lien<sup>1</sup> after contributing any work of improvement<sup>2</sup> to property.<sup>3</sup> Under Chapter 1615, a design professional<sup>4</sup> is entitled to a lien upon real property for which the design professional's work of improvement is planned.<sup>5</sup> Under Chapter 1615, the lien

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5. CAL. REV. & TAX. CODE § 18802.6(e)(2) (amended by Chapter 1484).

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1. See CAL. CIV. CODE § 3059 (West Supp. 1990) (specifying that the liens of mechanics are regulated by California Civil Code §§ 3109-3154).

2. See *id.* § 3106 (West 1974) (definition of work of improvement).

3. See *id.* § 3110. Persons entitled to a mechanic's lien include architects, registered engineers, and licensed land surveyors. *Id.*

4. See *id.* § 3081.1 (enacted by Chapter 1615) (definition of design professional).

5. *Id.* § 3081.2 (enacted by Chapter 1615). Chapter 1615 applies even where actual construction of the improvement has not commenced. *Id.* The lien attaches only if the landowner contracted for the design professional's services, the landowner continues to own the real property at the time the lien is recorded. *Id.* A design professional is entitled to a lien only if the landowner defaults or refuses to pay, and only if the design professional mails a written demand for payment and records a notice of lien. *Id.* § 3081.3 (enacted by Chapter 1615). The lien expires upon commencement of the work or 90 days after recording the notice of lien, unless the design



amount is the lesser of either the design professional's fee or the reasonable value of the services.<sup>6</sup> Chapter 1615 specifies that a design professionals' lien does not take priority over a construction lender's encumbrance or a prior recorded interest.<sup>7</sup>

*JYE*

## **Business Associations and Professions; engineer indemnification**

Civil Code § 2782.6 (new); § 2782 (amended).  
SB 1922 (Davis); 1990 STAT. Ch. 814

Existing law deems void any construction contract indemnifying the contractor against liability for death or bodily injury, property damage, or any other loss solely arising from the negligence or willful misconduct of the contractor.<sup>1</sup> Chapter 814 legalizes indemnification agreements that provide for identification and evaluation of hazardous materials,<sup>2</sup> or for any preliminary

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professional brings an action to enforce the lien. *Id.* § 3081.4(b) (enacted by Chapter 1615). If a design professional knows or has reason to know that the landowner will not commence the work of improvement, the design professional must file a notice of lien within 90 days. *Id.* § 3081.7 (enacted by Chapter 1615). *See In re Morrell*, 42 Bankr. 973, 981 (Bankr. N.D. Cal. 1984) (architect's claim for services rendered in preparation of drawings and plans supported a lien). *See also* 1990 Cal. Stat. ch. 1615, sec. 2, at (evidencing legislative intent to establish the exclusive lien remedy for design professionals in cases where no construction is commenced prior to recording the notice of lien).

6. CAL. CIV. CODE § 3081.2 (enacted by Chapter 1615). Under Chapter 1615, the amount of the lien is reduced by any deposit or prior payments. *Id.*

7. *Id.* § 3081.9 (enacted by Chapter 1615). Chapter 1615 applies only if the prior interest is duly recorded before the design professionals' lien is recorded. *Id.* Chapter 1615 does not affect a design professional's ability to secure a mechanic's lien. *Id.* § 3081.6 (enacted by Chapter 1615).

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1. CAL. CIV. CODE § 2782(a) (amended by Chapter 814). Contracts of indemnification are against public policy and are held to be void and unenforceable. *Id.* Exceptions to this policy are found in situations where the contractor enters adjacent property, for certain proscribed inspection services and for design defects or specific agreements arising out of the construction contract. *Id.* *See generally id.* §§ 2782.1, 2782.2, 2782.5 (West Supp. 1990) (provisions excepting certain contracts for indemnification).

2. *See id.* § 2782.6(d) (enacted by Chapter 814) (definition of hazardous materials).

assessment, design, and remediation services relating to hazardous materials.<sup>3</sup> Any indemnification contract created under Chapter 814 is only valid for damages arising from or related to subterranean contamination or concealed conditions.<sup>4</sup>

*UOR*

## **Business Associations and Professions; escrow agents**

Financial Code § 17607 (repealed and new); § 17214 (new); §§ 17207, 17213, 17213.2, 17408, 17415, 17606 (amended).  
AB 2774 (Eastin); 1990 STAT. Ch. 1186  
Support: Department of Corporations

Under existing law, each licensed escrow agent<sup>1</sup> is assessed a pro rata share of the agent's gross annual income.<sup>2</sup> Prior law limited increases of this yearly assessment to an amount no greater than the Consumer Price Index (CPI).<sup>3</sup> Chapter 1186 deletes the

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3. *Id.* § 2782.6(a) (amended by Chapter 814). Chapter 814 allows contracts to indemnify professional engineers, geologists, agents, servants, independent contractors, subsidiaries, or employees of an engineer or geologist. *Id.* Other services where indemnification is allowed include services described in California Health and Safety Code sections 25322 and 25323 and services under the federal National Oil and Hazardous Substances Pollution Contingency Plan, if the services relate to subterranean contamination and if the promisor is responsible for all or part of the contamination. *Id.* See 40 C.F.R. § 300.1 (1989) (National Oil and Hazardous Substances Pollution Contingency Plan).

4. CAL. CIV. CODE § 2782.6(b) (enacted by Chapter 814). Under Chapter 814, a contractor is still liable for damages for the first \$250,000. *Id.* Chapter 814 does not apply to damages incurred by the contractor due to gross negligence or willful misconduct. *Id.* § 2782.6(e) (enacted by Chapter 814). Chapter 814 does not affect the owner and the contractor's financial liability to third parties. *Id.* § 2782.6(e) (enacted by Chapter 814). Chapter 814 also does not apply to public entities. *Id.* § 2782.6(f) (enacted by Chapter 814).

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1. See CAL. FIN. CODE § 17004 (definition of escrow agent). See also *id.* §§ 17005.5, 17006 (other uses of term "escrow agent"). See *id.* § 17200 (West 1989) (requirement that escrow agents be licensed).

2. CAL. FIN. CODE § 17207(e) (amended by Chapter 1186). The assessment provides for administration and enforcement of regulations affecting the industry by the Department. *Id.*

3. 1988 Cal. Stat. ch. 1300, sec. 1, at 3310 (amending CAL. FIN. CODE § 17207) (amended by Chapter 1186).

CPI ceiling and requires the Department of Corporations (Department)<sup>4</sup> to credit excessive amounts collected to each agent.<sup>5</sup>

Existing law prohibits any transfer or assignment of an escrow agent's license.<sup>6</sup> Chapter 1186 also prohibits agents from transacting business under a name different than that filed with the Department.<sup>7</sup>

Prior law required the Commissioner of Corporations (Commissioner)<sup>8</sup> to immediately commence an audit of an escrow agent that failed to file any required report.<sup>9</sup> Chapter 1186 allows the Commissioner to elect when to audit any escrow agent.<sup>10</sup> Chapter 1186 also allows the Commissioner to elect whether to revoke an agent's license for failure to comply with a final discontinuance order.<sup>11</sup> Additionally, Chapter 1186 authorizes penalties for failure to file any required report.<sup>12</sup> Prior law generally empowered the Commissioner to enjoin violations and enforce civil penalties.<sup>13</sup> Chapter 1186 more specifically authorizes the Commissioner to bring actions seeking preliminary

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4. See CAL. CORP. CODE § 25600 (West Supp. 1990) (creation and responsibilities of the Department).

5. CAL. FIN. CODE § 17207(e) (amended by Chapter 1186). Chapter 1186 restricts the 1991-92 assessment to a maximum of 150% of the 1990-91 assessment, and subsequent assessments must not increase by more than 25% of the previous assessment. *Id.* Cf. *id.* § 8030 (West 1989) (similar procedure for assessment of state-chartered savings associations).

6. *Id.* § 17213(b) (amended by Chapter 1186). Existing law also prohibits acquiring a license through stock purchase, foreclosure, or other methods without the consent of the Commissioner of the Department. *Id.*

7. *Id.* § 17213(a) (amended by Chapter 1186). Cf. *id.* § 19024 (West 1989) (similar provision applicable to industrial loan companies).

8. See CAL. CORP. CODE § 25600 (West Supp. 1990) (creation and responsibilities of the Commissioner of Corporations).

9. CAL. FIN. CODE § 17408 (amended by Chapter 1186). See *id.* § 17406 (West 1989) (listing of required reports).

10. *Id.* § 17408(a) (amended by Chapter 1186).

11. CAL. FIN. CODE § 17606 (amended by Chapter 1186). See *id.* § 17415 (West 1989) (discontinuance order procedures and requirements).

12. *Id.* § 17408(b) (amended by Chapter 1186). The penalty is \$100 a day for the first five days the report is overdue and \$500 a day thereafter, with a maximum penalty of \$15,000. *Id.* Cf. *id.* § 8160 (West Supp. 1990) (similar provision for savings and loan association reports).

13. 1951 Cal. Stat. ch. 364, sec. 17607, at 1114 (enacting CAL. FIN. CODE § 17607) (repealed and enacted by Chapter 1186).

and permanent injunctions, and restraining orders or writs of mandate.<sup>14</sup>

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## **Business Associations and Profession; Escrow Agents' Fidelity Corporation**

Financial Code §§ 17314.3, 17323, 17332, 17333, 17336, 17348, 17423 (amended).  
AB 4224 (Lancaster); 1990 STAT. Ch. 1431

Under existing law, a licensed escrow agent<sup>1</sup> must be a member of the Escrow Agents' Fidelity Corporation (Corporation).<sup>2</sup> Chapter 1431 allows the Corporation to recover any attorney's fees and costs incurred in defending a claim made directly against the Corporation.<sup>3</sup> Chapter 1431 also allows the Corporation to recover attorney's fees and costs for bringing an action against a member to recover the member's deductible.<sup>4</sup>

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14. CAL. FIN. CODE § 17607(a) (enacted by Chapter 1186). Chapter 1186 also permits the appointment of a fiduciary to exercise any and all powers of the defendant escrow agent. *Id.* The Commissioner may also seek ancillary relief on behalf of the persons damaged by the underlying cause of action. *Id.* § 17607(b) (enacted by Chapter 1186). *Cf.* CAL. CORP. CODE § 25530 (West 1977) (similar provisions applicable to enforcement of corporate securities laws).

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1. See CAL. FIN. CODE § 17200 (West 1989) (requirement for a license to engage in business as an escrow agent).

2. *Id.* § 17312. See *id.* §§ 17310(a) (purpose of the Corporation is to indemnify a member against loss). See also *id.* § 17314.3(a) (amended by Chapter 1431) (deductible amount applies to each loss suffered by a member).

3. *Id.* § 17314.3(d) (amended by Chapter 1431).

4. *Id.* § 17314.3(e) (amended by Chapter 1431). However, a deductible may not be recovered if recovery would cause a member to be unable to maintain the member's bond or would decrease the member's tangible net worth below the statutorily-required level. *Id.* See *id.* §§ 17202, 17202.1 (West 1989) (bond requirements); 17210 (escrow agent must maintain a specified tangible net worth). See also *id.* §§ 17323(d) (amended by Chapter 1431) (prohibiting Corporation from recovering attorney's fees and costs incurred to collect assessments if recovery would cause a member to be unable to maintain the member's bond or would decrease the member's tangible net worth below the required level). See generally *id.* § 17321 (West Supp. 1990) (definition of assessments).

Under existing law, the Corporation has the authority to investigate claims filed by members,<sup>5</sup> and may participate in an audit of a member at the request of the Commissioner of Corporations.<sup>6</sup> Chapter 1431 allows the Corporation to initiate an audit without a claim being filed and without a request for an audit being made by the Commissioner of Corporations.<sup>7</sup>

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## **Business Associations and Professions; facsimile telephone numbers**

Business and Professions Code § 22600 (new); Public Utilities Code § 728.4 (new).  
SB 1807 (Kopp); 1990 STAT. Ch. 973

Prior to the enactment of Chapter 973, California law did not prevent the publication of facsimile machine (fax) telephone numbers<sup>1</sup> without the permission of the assigned fax telephone number subscriber.<sup>2</sup> Chapter 973 requires any publisher of a commercial directory<sup>3</sup> of telephone numbers to secure the written consent of a fax telephone number subscriber prior to publishing

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5. *Id.* § 17336(a) (amended by Chapter 1431).

6. *Id.* § 17336(d) (amended by Chapter 1431).

7. *Id.* § 17336(f) (amended by Chapter 1431). In conducting an investigation pursuant to a member's failure to pay an assessment, Chapter 1431 allows the Corporation to recover reasonable attorney's fees and costs as long as recovery would not cause a member to be unable to maintain the member's bond or decrease the member's tangible net worth below the required level. *Id.* § 17336(h) (amended by Chapter 1431).

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1. *See* CAL. BUS. & PROF. CODE § 22600(b)(2) (enacted by Chapter 973) (definition of telephone number for facsimile machine).

2. *But cf.* CAL. PUB. UTIL. CODE §§ 2891 (West Supp. 1990) (telephone number subscriber's written consent is required for release of specified information); 2891.1 (unlisted numbers must be withheld from subscriber listings).

3. *See* CAL. BUS. & PROF. CODE § 22600(b)(1) (enacted by Chapter 973) (definition of commercial directory).

any facsimile machine telephone number.<sup>4</sup> Under Chapter 973, a telephone corporation may publish a fax telephone number in the telephone corporation's alphabetical or classified directory only if requested by the subscriber.<sup>5</sup>

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## **Business Associations and Professions; financial institutions--interstate ownership**

Financial Code § 3755 (repealed and new); § 3756.3 (new); §§ 3751, 3752, 3753, 3754, 3756, 3759 (amended).

AB 3813 (Lewis); 1990 STAT. Ch. 748

Support: State Banking Department

Existing law prohibits any foreign bank holding company<sup>1</sup> from forming specified business associations with any California bank<sup>2</sup> or California bank holding company<sup>3</sup> unless prescribed procedures

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4. *Id.* § 22600(a) (enacted by Chapter 973). Permission of the subscriber is not required if the telephone number is obtained from a telephone corporation's directory. *Id.* § 22600(a) (enacted by Chapter 973).

5. CAL. PUB. UTIL. CODE § 728.4 (enacted by Chapter 973). Chapter 973 requires every publisher of a commercial directory to notify fax telephone number subscribers with previously published numbers of the provisions of Chapter 973 and to exclude previously published numbers from future publications at the request of the subscriber. CAL. BUS. & PROF. CODE § 22600(c) (enacted by Chapter 973).

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1. *See* CAL. FIN. CODE §§ 3751(g) (amended by Chapter 748) (definition of foreign bank holding company as any bank holding company other than a California bank holding company); 3751(a) (amended by Chapter 748) (definition of bank holding company includes any company that has control over any bank). *See also id.* § 3752(a) (amended by Chapter 748) (statutory guidance for determining the home state of a bank holding company).

2. *See id.* §§ 3751(c) (amended by Chapter 748) (definition of California bank as a bank maintaining a head office in California); 3751(b) (amended by Chapter 748) (definition of bank includes any banking institution incorporated to engage in the commercial banking business).

3. *See id.* § 3751(d) (amended by Chapter 748) (definition of California bank holding company as a bank holding company conducting operations principally in California).

and conditions are satisfied.<sup>4</sup> Prior law provided a limited exception to the prohibitions placed on foreign bank holding companies and was applicable to non-United States banks or bank holding companies meeting specified criteria.<sup>5</sup> Chapter 748 repeals this provision.<sup>6</sup> Chapter 748 increases the number of statutory exceptions to the prohibitions placed on foreign bank holding companies.<sup>7</sup> Additionally, Chapter 748 provides expanded guidance for determining the home state of involved banks and bank holding companies.<sup>8</sup>

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4. *Id.* §§ 3754, 3756 (amended by Chapter 748). Prohibited business associations between a foreign bank holding company and a California bank or a California bank holding company include: (1) Causing or permitting a California bank or bank holding company to become the subsidiary of a foreign bank holding company; (2) merger or consolidation with any California bank or holding company; and (3) acquisition by a foreign bank holding company of a specified number of shares or percentage of assets of a California bank or bank holding company. *Id.* § 3754 (amended by Chapter 748). A foreign bank holding company must submit an application containing specific information and a filing fee of \$2,500 to the Superintendent of Banking (Superintendent) for the approval of any listed transaction. *Id.* § 3756(a) (amended by Chapter 748). If the Superintendent makes required findings, the application is approved. *Id.* § 3756(b) (amended by Chapter 748). *See id.* §§ 3751(j) (amended by Chapter 748) (definition of subsidiary); 210 (West 1989) (definition of Superintendent of Banks as chief officer of the state Banking Department); 215 (duties of Superintendent include exercising all powers necessary for administration and enforcement of laws relating to banks and banking).

5. 1986 Cal. Stat. ch. 1057, sec. 2, at 435 (enacting CAL. FIN. CODE § 3755) (repealed and enacted by Chapter 748).

6. 1990 Cal. Stat. ch. 748, sec. 5, at (repealing CAL. FIN. CODE § 3755).

7. CAL. FIN. CODE § 3755 (repealed and enacted by Chapter 748). The exceptions apply in specified situations including a merger of two California banks, or a prescribed type of merger of a foreign bank holding company and a California bank or California bank holding company. *Id.* § 3755(b)-(c) (repealed and enacted by Chapter 748).

8. *Id.* § 3752 (amended by Chapter 748) (statutory guidance for determining the home state of both foreign (other nation) banks and foreign (other state) banks). Chapter 748 also provides specific guidance for determining when one company controls another. *Id.* § 3752(e) (enacted by Chapter 748). *See id.* §§ 3751(i) (amended by Chapter 748) (definition of foreign (other nation) bank and foreign (other state) bank); 3751(f) (amended by Chapter 748) (definition of control); 3751(e) (amended by Chapter 748) (definition of company).

## **Business Associations and Professions; financial institutions--variable interest rate loans**

Civil Code § 1916.5 (amended).

AB 2728 (Lancaster); 1990 STAT. Ch. 157

Sponsor: California League of Savings Institutions

Existing law regulates variable interest rate loans<sup>1</sup> used to purchase or construct real property containing four or fewer residential units.<sup>2</sup> Supervised financial organizations<sup>3</sup> are exempt from these regulations.<sup>4</sup> Chapter 157 extends the definition of supervised financial organizations to also exempt federally regulated savings associations and savings banks.<sup>5</sup> Chapter 157 also applies this definition to any security document or evidence of debt issued on or after January 1, 1990.<sup>6</sup>

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1. See CAL. CIV. CODE § 1916.5 (amended by Chapter 157) (requirements for variable interest rate loans). See generally Rabin & Brownlie, *Usury Law in California: A Guide Through the Maze*, 20 U.C. DAVIS L. REV. 397 (1987) (comprehensive analysis of regulation of variable interest rate loans in California).

2. CAL. CIV. CODE § 1916.5(a)-(b) (amended by Chapter 157).

3. See *id.* § 1916.5(d)(1) (amended by Chapter 157) (definition of supervised financial organization).

4. *Id.* § 1916.5(a) (amended by Chapter 157).

5. *Id.* § 1916.5(d)(1) (amended by Chapter 157).

6. 1990 Cal. Stat. ch. 157, sec. 2, at \_\_\_\_.



## **Business Associations and Professions; foreign and domestic corporate mergers**

Corporations Code § 1108 (amended).

AB 2906 (Seastrand); 1990 STAT. Ch. 567

Sponsor: Secretary of State

Under existing law, the merger of a foreign<sup>1</sup> and a domestic corporation<sup>2</sup> is regulated under the laws of the surviving corporation's<sup>3</sup> jurisdiction.<sup>4</sup> If the surviving corporation is a foreign corporation, the merger becomes effective under the laws of the foreign corporation's jurisdiction.<sup>5</sup>

Under Chapter 567, if the date of filing<sup>6</sup> in California is more than six months after the time the merger becomes effective in the foreign jurisdiction, the merger becomes effective as to the domestic disappearing corporation<sup>7</sup> on the California filing date.<sup>8</sup> A certificate of ownership<sup>9</sup> is sufficient to fulfill the statutory filing requirement.<sup>10</sup> A foreign disappearing corporation surrenders the right to transact intrastate business as of the date of filing in California.<sup>11</sup>

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1. See CAL. CORP. CODE § 171 (West Supp. 1990) (definition of foreign corporation).

2. See *id.* § 167 (West 1977) (definition of domestic corporation).

3. See *id.* § 190 (definition of surviving corporation).

4. *Id.* § 1108(b) (amended by Chapter 567).

5. *Id.* § 1108(d) (amended by Chapter 567).

6. See *id.* § 1103 (West Supp. 1990) (filing procedures for surviving corporation).

7. See *id.* § 165 (West 1977) (definition of disappearing corporation).

8. *Id.* § 1108(e) (amended by Chapter 567). Chapter 567 also applies if the powers of the domestic corporation were suspended at the time of the effective filing date in the foreign jurisdiction. *Id.* Under existing law, the effective date for the domestic disappearing corporation upon a timely California filing is the date of filing in the foreign jurisdiction. *Id.* § 1103(d) (amended by Chapter 567).

9. See *id.* § 1110(d) (West Supp. 1990) (requirements for short form merger certificate of ownership).

10. *Id.* § 1108(d) (amended by Chapter 567). This requirement may also be satisfied by filing a copy of the agreement filed by the surviving foreign corporation, an executed counterpart of the agreement, or a copy of the agreement of merger. *Id.*

11. *Id.* § 1108(e) (amended by Chapter 567).

## **Business Associations and Professions; foreign corporations--qualifications to transact business**

Corporations Code § 2203 (amended);  
Revenue and Taxation Code § 23304 (repealed); § 23571  
(repealed and new); §§ 23301.6, 23304.1, 23304.5, 23305.1,  
23305.2, 23305c (new); §§ 23301, 23301.5, 23302, 23305,  
23305a (amended); §§ 23572 (amended and renumbered).  
AB 2773 (Peace); 1990 STAT. Ch. 926  
Sponsor: California Bar Association  
Support: California Banker's Association

Existing law subjects any foreign corporation<sup>1</sup> which transacts intrastate business<sup>2</sup> and is not certified by the secretary of state,<sup>3</sup> to a penalty.<sup>4</sup> Chapter 926 requires the court to assess any penalties in an amount sufficient to reflect the circumstances of the violation.<sup>5</sup>

Existing law allows the secretary of state to force a foreign taxpayer corporation to forfeit its rights if certain conditions occur.<sup>6</sup> The corporation may be relieved of suspension or forfeiture by fulfilling qualifications set by the secretary of state, by paying all back taxes, penalties, and interest, and by receiving a certificate of revivor.<sup>7</sup>

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1. See CAL. CORP. CODE § 171 (West Supp. 1990) (definition of foreign corporation).

2. See *id.* § 191 (West 1977) (definition of "transacting intrastate business").

3. See *id.* § 2105 (West Supp. 1990) (requirements and procedure for a foreign corporation to be certified).

4. *Id.* § 2203(a) (amended by Chapter 926). A penalty of \$20 for each day that unauthorized intrastate business is transacted may be assessed against foreign corporations that do not hold valid certificates. *Id.*

5. *Id.* § 2203(b) (amended by Chapter 926). Under this subsection the \$20 penalty specified in California Corporations Code section 2203 subsection (a) must be based on the size of the corporation and the willfulness of the violation. *Id.*

6. CAL. REV. & TAX. CODE § 23301(a)-(c) (amended by Chapter 926).

7. *Id.* § 23305 (amended by Chapter 926). The certificate of revivor must be issued by the Franchise Tax Board. *Id.* Application for the certificate of revivor may be made by any stockholder or creditor, by a majority of the surviving trustees or directors, by an officer, or by any other person who has interest in the relief from suspension or forfeiture. *Id.* Before the certificate of revivor is issued by the Franchise Tax Board, the secretary of state must endorse the application, signifying that the corporation has met all requirements. *Id.* § 23305a (amended by Chapter 926).

Under Chapter 926, every contract made in California by a corporate taxpayer during the time that the taxpayer's corporate powers, rights, and privileges are suspended or forfeited are voidable at the option of any party to the contract other than the taxpayer.<sup>8</sup> If a taxpayer fails to file a tax return, pay any tax or other amount owing to the Franchise Tax Board, or file any required statement or return within sixty days of receiving written demand, any contract made in California by that taxpayer between the end of the sixty day period and the date that the taxpayer files the return or statement is voidable at the option of any party to the contract, other than the taxpayer.<sup>9</sup>

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## **Business Associations and Professions; industrial loan companies**

Financial Code § 18412 (new).

AB 2612 (Lancaster); 1990 STAT. Ch. 679

Existing law authorizes the Commissioner of Corporations (Commissioner)<sup>1</sup> to require industrial loan companies<sup>2</sup> to file specified reports.<sup>3</sup> Existing law further provides that any person who willfully violates the rules created by the Commissioner is guilty of a misdemeanor.<sup>4</sup> Chapter 679 requires the Commissioner

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8. *Id.* § 23304.1(a) (enacted by Chapter 926).

9. *Id.* § 23304.1(d) (enacted by Chapter 926). This provision applies only to a taxpayer that has a corporate account number from the Franchise Tax Board but has not qualified to do business under California Corporations Code section 2105. *Id.*

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1. *See* CAL. FIN. CODE § 18002 (West 1989) (definition of Commissioner).

2. *See id.* § 18003 (definition of industrial loan company).

3. *Id.* §§ 18347, 18393. *See id.* §§ 18405 (audit reports and financial statements); 18407 (unaudited financial statements); 18408 (special reports); 18409 (annual composite of reports); 18410 (statistical information).

4. *Id.* § 18435. *See* 10 CAL. CODE REGS. §§ 1245-1253 (1990) (rules and regulations made by the Commissioner).

to charge a penalty of \$100 for each day a required report is late or withheld by the industrial loan company due to that company's failure or neglect.<sup>5</sup>

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## **Business Associations and Professions; industrial loan companies--escrow agents and accounts**

Finance Code § 18322 (new); §§ 17202.1, 17409 (amended).

SB 2638 (Craven); 1990 STAT. Ch. 1306

Sponsor: California Association of Thrift and Loan Companies

Existing law requires an applicant for an escrow<sup>1</sup> agent's<sup>2</sup> license<sup>3</sup> to deposit a bond in a specified amount with the Commissioner of Corporations (Commissioner).<sup>4</sup> Existing law allows an applicant to deposit a cash bond with the Commissioner in lieu of the required bond.<sup>5</sup> As evidence of the cash bond,

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5. CAL. FIN. CODE § 18412 (enacted by Chapter 679). Chapter 679 also applies to industrial loan companies that fail to include any required matter in a report. *Id.* All decisions and official acts of the Commissioner are subject to review for abuses of discretion. *Id.* § 18366. *Cf. id.* § 1938 (similar requirement for banks).

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1. See CAL. FIN. CODE § 17003 (West 1989) (definition of escrow).

2. See *id.* § 17004 (definition of escrow agent).

3. See *id.* § 17200 (any person acting as an escrow agent must do so as a corporation organized and approved by the Commissioner of Corporations). See also *id.* § 17002.5 (definition of person includes one person, a group of persons, or other legal entities). See generally Escrow Inst. of Cal. v. Pierno, 24 Cal. App. 3d 361, 370, 100 Cal. Rptr. 880, 886 (1972) (holding that the escrow law, beginning at California Finance Code section 17000, has a reasonable relation to a proper legislative objective, and the classifications established therein are not arbitrary or capricious).

4. CAL. FIN. CODE § 17202(a) (West 1989). The bond must be satisfactory to the Commissioner and in the amount of at least \$25,000. *Id.* See CAL. CORP. CODE § 25600 (West Supp. 1990) (the Commissioner of Corporations is the chief officer of the Department of Corporations); CAL. FIN. CODE §§ 18340-18367 (West 1989 & Supp. 1990) (powers of the Commissioner).

5. CAL. FIN. CODE § 17202.1 (amended by Chapter 1306). The cash bond must be in the amount of at least \$25,000. *Id.* §§ 17202(a) (West 1989), 17202.1 (amended by Chapter 1306). Evidence of the cash bond must be in the form of a deposit in an authorized bank, or an investment certificate or a share account in an authorized savings and loan. *Id.* § 17202.1 (amended by Chapter 1306). The funds must be assigned to the Commissioner and are not considered an asset of the

Chapter 1306 allows the applicant to deposit the specified amount in investment certificates of industrial loan companies.<sup>6</sup>

Existing law requires all funds deposited in escrow to be placed in a noninterest-bearing demand or checking account in specified financial institutions.<sup>7</sup> Chapter 1306 includes among the financial institutions qualified to receive escrow funds any industrial loan company that is approved by the Federal Deposit Insurance Corporation (FDIC)<sup>8</sup> and the Commissioner.<sup>9</sup>

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applicant. *Id.*

6. *Id.* See *id.* § 18003 (West 1989) (definition of an industrial loan company as any corporation that loans money in the regular course of business and issues its own chooses in action).

7. *Id.* § 17409 (amended by Chapter 1306). The funds must be deposited and maintained in a bank, a state or federal savings bank, or a savings and loan association. *Id.* The funds may later be deposited in an interest-bearing account but must be designated in a manner which indicates that the funds are not the funds of the escrow agent. *Id.* An industrial loan company must receive written consent from the Commissioner before accepting any funds deposited in escrow. *Id.* § 18322 (enacted by Chapter 1306). The Commissioner may impose limitations and requirements on industrial loan companies to ensure the safety and soundness of the company, and may revoke consent if the requirements are not met. *Id.*

8. See *id.* §§ 18521.5, 18521.6 (West 1989) (all industrial loan companies must be a member of the FDIC).

9. *Id.* § 17409 (amended by Chapter 1306).

## **Business Associations and Professions; law library fees**

Business and Professions Code §§ 6322.1, 6360 (amended);  
Government Code § 72055.2 (new); §§ 26820.6, 72055  
(amended).

SB 1609 (Davis); 1990 STAT. Ch. 56  
(*Effective April 20, 1990*)

Under existing law, a fee<sup>1</sup> may be imposed on a party filing the first papers in a civil action.<sup>2</sup> Chapter 56 increases the fees that may be imposed.<sup>3</sup> Chapter 56 also permits county law libraries to impose borrowers' fees on members of the bar residing in the county.<sup>4</sup>

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## **Business Associations and Professions; licenses**

Business and Professions Code §§ 6893.5, 6894.16, 6923  
(repealed); §§ 143, 9807, 9808, 9891.38 (new); §§ 119,  
2811.5, 2909, 3730, 4930, 5566.2, 6876, 6886.1, 6894.7,  
6900, 6906, 6915.4, 6921, 6980.24, 6980.40, 7508.2, 7544.5,  
7545, 7590.2, 9801, 9880.2, 9891.20, 9891.21, 9891.22,  
9891.23, 9891.34, 9891.37, 9891.39, 9891.42, 16240  
(amended).

AB 3242 (Lancaster); 1990 STAT. Ch. 1207

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1. See CAL. BUS. & PROF. CODE § 6322.1(a)-(b) (amended by Chapter 56) (fee schedules and requirements).

2. *Id.* §§ 6321 (West 1974); 6322.1 (amended by Chapter 56). The fees are used to defray the costs of a county law library. *Id.*

3. *Id.* § 6322.1(a)-(b) (amended by Chapter 56). The maximum fees are increased to \$20. *Id.*

4. *Id.* § 6360 (amended by Chapter 56).

Existing law requires persons engaged in specified businesses or professions to be licensed.<sup>1</sup> Under Chapter 1207, any person performing any service requiring a license must prove that they were licensed during the performance of services before bringing any action for the compensation of services rendered.<sup>2</sup>

Under prior law, persons seeking renewal of a license as a registered nurse<sup>3</sup> could, in lieu of other options,<sup>4</sup> complete an examination given by the Board of Registered Nursing.<sup>5</sup> Chapter 1207 repeals this option.<sup>6</sup>

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1. See, e.g.; CAL. BUS. & PROF. CODE § 1000-1005 (West 1990) (licensing requirements for chiropractors).

2. *Id.* § 143(a) (enacted by Chapter 1207). The doctrine of substantial compliance is not applicable to Chapter 1207. *Id.* § 143(b) (enacted by Chapter 1207). See *Asdourian v. Araj*, 38 Cal. 3d 276, 282-84, 696 P.2d 95, 99-100, 211 Cal. Rptr. 703, 706-708 (1985) (explanation of the doctrine of substantial compliance). See also CAL. BUS. & PROF. CODE § 121 (West Supp. 1990) (exception from license offenses and renewals).

3. See CAL. BUS. & PROF. CODE § 2725 (West 1990) (definition of nursing).

4. See *id.* § 2811.5 (amended by Chapter 1207). Other options available to applicants for renewal of their license include continuing education courses, or by other means which are declared to be appropriate by the board. *Id.*

5. 1978 Cal. Stat. ch. 212, sec. 3, at 457 (amending CAL. BUS. & PROF. CODE § 2811.5) (amended by Chapter 1207). See *id.* § 2701 (West Supp. 1990) (description of Board of Registered Nursing).

6. *Id.* § 2811.5(a) (amended by Chapter 1207).

## **Business Associations and Professions; licensed physicians and surgeons--specialties**

Business and Professions Code § 651 (amended).  
SB 2036 (McCorquodale); 1990 STAT. Ch. 1660

Existing law prohibits certain types of advertising by medical professionals licensed under the Medical Practice Act.<sup>1</sup> Under Chapter 1660, advertising by a physician or surgeon may include a statement that the physician or surgeon is certified by a private or public board only if that board is a member of the American Board of Medical Specialties, or the board maintains equivalent training requirements that are approved by that physician's licensing board.<sup>2</sup>

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1. CAL. BUS. & PROF. CODE § 651 (amended by Chapter 1660). Chapter 1660 also applies to physicians or surgeons licensed under the Osteopathic Initiative Act. *Id. See id.* §§ 2000-2525.23 (West 1990) (Medical Practice Act); 3600-1-3600-5 (Osteopathic Initiative Act). *See also id.* § 2041 (definition of licensee).

2. *Id.* § 651(h)(5) (amended by Chapter 1660). The advertising statement may also refer to certification by a board or association with an Accreditation Council for Graduate Medical Education approved postgraduate program that includes complete training in the specialty. *Id.* The licensee may advertise that the practice is limited to specific fields. *Id. See generally* Fraser, *Scar Wars: Horror Stories Mount As Unqualified Cosmetic Surgeons Cash In On Medicine's Last Unregulated Frontier*, San Francisco Chron., May 20, 1990, at A7 (discussion of deceptive advertising practices by uncertified surgeons performing plastic surgery).



## **Business Associations and Professions; marriage, family, and child counselors**

Business and Professions Code §§ 4980.02, 4980.43, 4980.50 (amended).

SB 2214 (Boatwright); 1990 STAT. Ch. 1086

Prior law explicitly allowed the use of hypnosis by a marriage, family, and child counselor<sup>1</sup> (counselor) during the course of client therapy.<sup>2</sup> Chapter 1086 deregulates the use of hypnosis by counselors.<sup>3</sup>

Under existing law, applicants for a marriage, family, and child counseling certificate must complete two years of supervised employment experience in a specified job site.<sup>4</sup> Under Chapter 1086, the required employment experience may be obtained by working as an intern in a private practice if the practice is owned by a licensed professional who directly supervises the applicant.<sup>5</sup>

Under existing law, the Board of Behavioral Science Examiners (Board)<sup>6</sup> may revoke or refuse to issue a license or registration to any applicant who is guilty of unprofessional conduct.<sup>7</sup> Chapter 1086 specifically directs the Board to license all applicants who

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1. See CAL. BUS. & PROF. CODE § 4980.02 (amended by Chapter 1086) (definition of marriage, family, and child counseling).

2. 1986 Cal. Stat. ch. 1365, sec. 4, at 659 (enacting CAL. BUS. & PROF. CODE § 4980.02) (amended by Chapter 1086).

3. CAL. BUS. & PROF. CODE § 4980.02 (amended by Chapter 1086).

4. *Id.* § 4980.43(a) (amended by Chapter 1086). Experience may be gained from a government entity, school, college or university, nonprofit and charitable corporation, or licensed health facility. *Id.* § 4980.43(b) (amended by Chapter 1086).

5. *Id.* § 4980.43(c) (amended by Chapter 1086). The supervising professional must be licensed as a marriage, family, and child counselor, psychologist, clinical social worker, physician or surgeon, or as a professional corporation dealing with any of these licensed professions. *Id.* The applicant must be employed by and at the same location as the supervisor. *Id.* See generally S. SMITH & R. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH 128 (1987) (discussion of licensing developments in the mental health profession).

6. See CAL. BUS. & PROF. CODE § 4980.35 (West 1990) (duties of the Board of Behavioral Science Examiners).

7. *Id.* § 4982 (also defining unprofessional conduct). See also *Jordan Packer v. Board of Behavioral Science Examiners*, 52 Cal. App. 3d 190, 196, 125 Cal. Rptr. 96, 100 (1975) (the Board has the power to revoke a counseling license if it determines that the applicant did not meet licensure requirements).

fulfill the examination requirements.<sup>8</sup> The Board must allow an applicant to take the exam and must report the exam results even if the Board receives a complaint against the applicant.<sup>9</sup>

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## **Business Associations and Professions; medical profession--professional discipline**

Business & Professions Code §§ 802.5, 803.5, 803.6, 2231, 2318, 2319, 2337 (new); §§ 805, 2032, 2082, 2220, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2235, 2292, 2293, 2307, 2313, 2332, 2335, 2342, 2344, 2354 (amended); Civil Code § 43.8 (amended); Government Code §§ 11371, 11372, 11373, 11373.3, 11529, 12529, 12529.5, 12529.7 (new).

SB 2375 (Presley); 1990 STAT. Ch. 1597

Support: Los Angeles District Attorney Ira Reiner, California Peace Officers Association, California Police Chiefs Association, California State Sheriffs Association, California Senior Legislature, California Trial Lawyers Association, California Union of Safety Employees, California Consumer Medical Report, Board of Podiatric Medicine, California Medical Association

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8. CAL. BUS. & PROF. CODE § 4980.50 (amended by Chapter 1086). An applicant will not be licensed if the applicant violated any rules justifying denial of licensure. *Id.*

9. *Id.* If the complaint could lead to a withdrawal of license, the Board may allow the applicant to take the oral examination while withholding the results or notifying the applicant that the license will be granted upon completion of an investigation. *Id.* Notwithstanding California Business and Professions Code section 135 (disallowing any agency from restricting an applicant's right to take an examination on the basis of failure to pass the examination in the past), the Board may deny an applicant's right to take oral and written examinations pending an investigation of a complaint if the applicant has failed either one of the previous examinations. *Id.*

Existing law regulates the medical profession under the authority of the Medical Board of California (Medical Board).<sup>1</sup> Under existing law, the disciplinary activities of the Medical Board are carried out by the Division of Medical Quality (Division),<sup>2</sup> which is responsible for investigating complaints and reviewing the quality of medical practice carried out by physician and surgeon certificate holders.<sup>3</sup> Chapter 1597 establishes the Health Quality Enforcement Section within the Department of Justice, and provides for the appointment of a Senior Assistant Attorney General to administer the Health Quality Enforcement Section.<sup>4</sup> Under Chapter 1597, the Health Quality Enforcement Section is

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1. See CAL. BUS. & PROF. CODE § 101.6 (West 1990) (general duties, powers, and purpose of boards, bureaus, and commissions). See also *id.* §§ 2001 (general provision for the creation of the Medical Board of California); 2319(a)-(b) (enacted by Chapter 1597) (no more than six months may elapse from the receipt of a complaint to the completion of an investigation, unless the case involves complex medical or fraud issues or complex business or financial arrangements that allow the investigation to be extended to one year). See generally *Fuller v. Board of Medical Examiners*, 14 Cal. App. 2d 734, 741-42, 59 P. 2d 171, 173 (1936) (legislature has the power to regulate the practice of medicine).

2. See CAL. BUS. & PROF. CODE § 2003 (West 1990). The Medical Board consists of a Division of Medical Quality, a Division of Licensing, and a Division of Allied Health Professions. *Id.* See also *id.* §§ 2313 (amended by Chapter 1597) (annual reporting requirements of the Division of Medical Quality); 2229 (amended by Chapter 1597). The highest priority of the Division is the protection of the public and, whenever possible, action should be taken to aid in licensee rehabilitation. *Id.*

3. *Id.* § 2220(b) (amended by Chapter 1597). The Division must investigate any physician and surgeon if there have been any judgments, settlements, or arbitration awards requiring payment of damages in excess of a cumulative total of \$30,000 with respect to any claims for injuries or damages caused by the physician and surgeon's error, negligence, or omission. *Id.* § 2220(c) The Division must also investigate the nature and causes of injuries if there have been a high number of judgments, settlements, or arbitration awards against a physician and surgeon. *Id.* See also *id.* § 2004 (West 1990) (responsibilities of the Division); CAL. BUS. & PROF. CODE §§ 2050 (West 1990) (definition of physician and surgeon's certificate); 2041 (definition of licensee). See generally 59 Op. Att'y Gen. 186, 193 (1976). A hospital is required to make patient records available to an investigator of the Division of Investigation if the investigation is of a person licensed under the Medical Practice Act. *Id.*; *Wood v. Superior Court*, 166 Cal.App.3d 1138, 212 Cal.Rptr. 311, 819-21, 1147-49 (1985) (examination of a patient's medical records by the Board of Medical Quality Assurance while investigating a physician is within the purview of the federal constitutional privacy amendment, and the Medical Board must demonstrate that the particular records it seeks are "relevant and material" to the Board's inquiry).

4. CAL. GOV'T CODE § 12529(a)-(b) (enacted by Chapter 1597).

primarily responsible for the prosecution of complaints and the continuing review of investigative activities.<sup>5</sup>

Existing law requires medical staffs, administrators of any health care facility, and peer review bodies of hospitals<sup>6</sup> to report to the Medical Board any adverse action taken against a licensee.<sup>7</sup> Chapter 1597 additionally imposes reporting requirements for coroners,<sup>8</sup> district attorneys or other prosecuting agencies,<sup>9</sup> court clerks,<sup>10</sup> and probation officers.<sup>11</sup>

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5. *Id.* § 12529(a) (enacted by Chapter 1597). Chapter 1597 specifically states that the decision to bring a disciplinary action proceeding is to be made by the executive officer of the Division in consultation with the Senior Assistant Attorney General. *Id.* § 12529.5(d) (enacted by Chapter 1597). *See id.* 11371(a) (enacted by Chapter 1597) (the Office of Administrative Hearings must make a list of administrative judges that are experienced in conducting hearings involving disciplinary actions). The judges on the list must be given preference for cases involving discipline of health care professionals and must be used exclusively for the adjudication of interim remedies as provided under California Government Code section 11529. *Id.* *See also id.* §§ 11372(a) (enacted by Chapter 1597) (under specified circumstances, all administrative hearings and proceedings relating to the discipline or reinstatement of licensees must be conducted by an administrative law judge); 11373(b) (specific time limit requirements for submission and review of proposed orders of discipline). *See generally* Bryce v. Board of Medical Quality Assurance, 184 Cal. App. 3d 1471, 1475, 229 Cal. Rptr. 483, 485-86 (1986) (there is no authority for the notion that the Board of Medical Quality Assurance is not bound by the discipline imposed by an administrative law judge or even that the penalty must be directly related to the offense).

6. *See* CAL. BUS. & PROF. CODE § 805(a)(1) (amended by Chapter 1597) (definition of peer review body). *See also* Applebaum v. Board of Directors of Barton Memorial Hosp., 104 Cal. App. 3d 648, 657, 163 Cal.Rptr. 831, 836 (1980) (holding that where due process requires an administrative hearing, an individual has a right to a tribunal meeting currently prevailing standards of impartiality; review by biased decision makers is constitutionally impermissible and even the probability of unfairness is to be avoided); Gill v. Mercy Hosp., 199 Cal. App. 3d 889, 902, 245 Cal. Rptr. 304, 311 (1988). Due process requirement of a fair hearing is not violated when the hospital does not permit the doctor to be represented by counsel at a factual peer review hearing. *Id.*

7. CAL. BUS. & PROF. CODE § 805(b) (amended by Chapter 1597). No person may be held civilly or criminally liable for making a report. *Id.* § 805(d) (amended by Chapter 1597). A failure to make a report is punishable by a fine up to \$5,000, or by a fine up to \$10,000 if the failure to make a report is intentional. *Id.* § 805(e)-(f) (amended by Chapter 1597). *See generally* Hogen v. Valley Hospital, 147 Cal.App.3d 119, 123, 195 Cal.Rptr. 5, 7 (1983) (holding that a publication made in any legislative, judicial, or other official proceeding authorized by law is absolutely privileged in all actions except those for malicious prosecution).

8. *See* CAL. BUS. & PROF. CODE § 802.5(a) (enacted by Chapter 1597) (reporting requirements and guidelines for coroners). The report required by this provision must be confidential and cannot result in liability for damages in any civil action. *Id.* § 802.5(b) (enacted by Chapter 1597).

9. *See id.* § 803.5(a) (enacted by Chapter 1597) (reporting requirements for district attorneys, city attorneys, and other prosecuting agencies).

10. *See id.* §§ 803.5(b), 803.6(a) (enacted by Chapter 1597) (reporting requirements for court clerks).

Under existing law, the Division is required to seek an injunction against a physician or surgeon if there is reasonable cause to believe that the public health, safety, and welfare is endangered.<sup>12</sup> Chapter 1597 authorizes the Division, in those instances, to issue an interim order suspending the licensee's practice or to impose other licensing restrictions.<sup>13</sup>

Under existing law, any physician who is found guilty in a disciplinary hearing may be subject to probation, suspension, or license revocation.<sup>14</sup> Chapter 1597 allows the Division to also publicly reprimand the physician, take any other discipline-related action, and make specified matters available to the public.<sup>15</sup>

Under existing law, a physician can be ordered to undergo a professional competency exam<sup>16</sup> if after investigation and review there is reasonable cause<sup>17</sup> to believe that the physician is

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11. *Id.* §§ 802.5, 803.5, 803.6 (enacted by Chapter 1597) *See also* 1990 Cal. Stat. ch. 1597, sec. 1, at (legislative intent is to provide the Medical Board with more information from a variety of enhanced reporting sources). *See also* CAL. BUS. & PROF. CODE § 2318 (enacted by Chapter 1597) (provides that any report made to the Medical Board indicating that a Medical Board licensee may be guilty of unprofessional conduct, or may be impaired because of drug or alcohol abuse or mental illness, will not result in liability for damages in any civil action on account of the communication of that information to the Medical Board).

12. CAL. BUS. & PROF. CODE § 2312 (West 1990).

13. CAL. GOV'T CODE § 11529(a) (enacted by Chapter 1597). Interim orders may only be issued if there is an affidavit showing that the licensee has engaged in or is about to engage in acts or omissions that would violate the Medical Practice Act. *Id.* Other licensing restrictions available to the Division include drug testing, continuing education, and supervision of procedures. *Id.* Upon the service of an accusation, the licensee may request a hearing regarding the accusation and the Medical Board must provide that hearing within 30 days of the request. *Id.* § 11529(f) (enacted by Chapter 1597). During an interim order hearing, the licensee is entitled to the following rights: (1) To be represented by counsel; (2) to have a record made of the proceedings; (3) to call, examine, and cross-examine witnesses; (4) to present and rebut relevant evidence; and (5) to present oral argument. *Id.* § 11529(d) (enacted by Chapter 1597).

14. CAL. BUS. & PROF. CODE § 2227 (amended by Chapter 1597). *See id.* § 2228 (amended by Chapter 1597) (probation guidelines).

15. *Id.* § 2227 (amended by Chapter 1597). Any matter heard under section 2227(a) of the California Business and Professions Code, except for warning letters, medical review or advisory conferences, or other matters made confidential or privileged by existing law is deemed public and must be made available to the public. *Id.* § 2227(b) (enacted by Chapter 1597).

16. *Id.* § 2293(a) (amended by Chapter 1597). The professional competency exam tests for medical knowledge and any special knowledge of a physician in the examinee's area of medical practice. *See also id.* § 2294 (West 1990) (confidentiality of the examination and records).

17. Reasonable cause may be demonstrated by one or more of the following: (1) A single incident of gross negligence; (2) a pattern of inappropriate prescribing of medication; (3) an act of incompetence or negligence causing death or serious bodily injury; or (4) a pattern of substandard

incapable of safely practicing medicine.<sup>18</sup> Under prior law, the competency exam was to be in the form of an oral clinical exam given by two physicians.<sup>19</sup> Under Chapter 1597, the competency exam is to be given by three physician examiners, and a failing grade from two of the examiners constitutes failure of the exam.<sup>20</sup> Under Chapter 1597, a second exam will only be ordered upon a finding that the original exam was unfair.<sup>21</sup> Prior law allowed a physician whose license had been revoked or suspended or who had been placed on probation to petition for reinstatement or modification of the penalty after one year.<sup>22</sup> Chapter 1597 increases the time period that a physician must wait in order to petition for reinstatement or modification of specified penalties.<sup>23</sup>

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care. *Id.* § 2292(a) (amended by Chapter 1597).

18. *Id.* § 2292(b) (amended by Chapter 1597). Chapter 1597 requires that, upon referral from the Division, the matter must be drafted and presented by the Senior Assistant Attorney General in a written petition detailing his or her basis for finding reasonable cause. *Id.* A copy of the petition must be served on the physician and the physician must have the opportunity to file a written opposition to the petition within 45 days after service. *Id.*

19. 1989 Cal. Legis. Serv. ch. 886, sec. 24, at 2615 (West) (amending CAL. BUS. & PROF. CODE § 2292) (amended by Chapter 1597). If the examinee failed the original exam, a second exam could have been scheduled within 90 days before two different examiners. *Id.* A failing grade from both of the examiners constituted a failure of the exam. *Id.*

20. CAL. BUS. PROF. CODE § 2293(a)-(b) (amended by Chapter 1597). The examination must be tape recorded, and after failure of an examination the Board must supply a copy of the tape to the examinee. *Id.*

21. *Id.* § 2293(d) (amended by Chapter 1597). Within 45 days of the receipt of the tape of the examination, a physician may request a hearing to determine whether the physician is entitled to take a second examination. *Id.* § 2293(e) (amended by Chapter 1597).

22. 1987 Cal. Stat. ch. 1413, sec. 2, at 234 (amending CAL. BUS. & PROF. CODE § 2307) (amended by Chapter 1597).

23. *Id.* § 2307(a)-(c) (amended by Chapter 1597). A person whose certificate has been revoked or suspended or that has been placed on probation may petition the Division for reinstatement or modification of penalty under the following minimum periods: (1) At least three years for reinstatement of a license revoked for unprofessional conduct; (2) at least two years for early termination of probation of three years or more; and (3) at least one year for modification of a condition, or reinstatement of a license revoked for mental or physical illness, or termination of probation of not less than three years. *Id.*

## **Business Associations and Professions; mutual water corporations**

Corporations Code §§ 904, 911 (amended).  
AB 2284 (Peace); 1990 STAT. Ch. 677

Under existing law, an amendment of a corporation's articles of incorporation to make the shares of the corporation assessable<sup>1</sup> must be approved by all holders of the affected outstanding shares.<sup>2</sup> Chapter 677 allows a mutual water corporation (MWC)<sup>3</sup> to amend its articles of incorporation to make shares assessable with the approval of the holders of two-thirds of the affected outstanding shares.<sup>4</sup>

Existing law allows for the conversion of a corporation into a nonprofit corporation<sup>5</sup> or cooperative corporation.<sup>6</sup> Chapter 677 allows an MWC to convert to a nonprofit corporation with the

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1. See CAL. CORP. CODE § 423 (West Supp. 1990) (assessment of shares). The only remedy for the collection of an assessment on fully paid shares is sale or forfeiture, unless a remedy by action is expressly authorized in the articles of incorporation and a statement allowing a remedy by action appears on the face of the share certificates. *Id.* § 423(n).

2. *Id.* § 904(a) (amended by Chapter 677).

3. See CAL. PUB. UTIL. CODE § 2705 (West 1975) (definition of an MWC as a corporation that is organized for the delivery of water at cost). Chapter 677 applies exclusively to MWC's organized for the delivery of water to stockholders and members at cost. CAL. CORP. CODE § 904(b) (amended by Chapter 677).

4. CAL. CORP. CODE § 904(b) (amended by Chapter 677). However, Chapter 677 requires approval by all shares affected if the amendment would authorize a remedy by action for the collection of an assessment on fully paid shares. *Id.*

5. See *id.* §§ 5059 (West Supp. 1990) (definition of nonprofit mutual benefit corporation), 5060 (definition of nonprofit public benefit corporation), 5061 (definition of nonprofit religious corporation).

6. *Id.* § 911(a) (amended by Chapter 677). Existing law requires that any amendment to convert to a nonprofit corporation must be approved by holders of the outstanding shares. *Id.* § 911(c) (amended by Chapter 677). See *id.* § 911(b) (amended by Chapter 677) (requirements for conversion). See also *id.* § 12201 (West Supp. 1990) (purpose of cooperative corporation).

approval of the holders of the outstanding shares.<sup>7</sup>

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## **Business Associations and Professions; nonprofit corporations--director and officer liability**

Civil Procedure Code § 425.15 (amended); Corporations Code § 5231.5 (repealed); §§ 5047.5, 5239, 7231.5, 9247 (amended).

AB 2292 (Chandler); 1990 STAT. Ch. 107

Support: California State Bar Association

Existing law grants qualified immunity<sup>1</sup> to volunteer<sup>2</sup> directors<sup>3</sup> and officers<sup>4</sup> of specified nonprofit corporations<sup>5</sup>

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7. *Id.* § 911(e) (amended by Chapter 677). Chapter 677 requires each outstanding share to be converted to a membership of a nonprofit mutual benefit corporation in order to allow conversion by the approval of the majority. *Id.* § 911(e) (amended by Chapter 677). *See id.* § 152 (West 1977) (definition of approval of the outstanding shares).

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1. *See* CAL. CORP. CODE § 5047.5 (amended by Chapter 107) (immunity granted in an effort to provide incentive and protection to individuals who serve as uncompensated officers or directors of nonprofit corporations). The immunity arises when directors or officers commit negligent acts or omissions within the scope of their duties and in the exercise of policy-making judgment. *Id.* § 5047.5(b) (amended by Chapter 107). *But see* *Frances T. v. Village Green Owners Ass'n*, 42 Cal. 3d 490, 504, 723 P.2d 573, 580, 229 Cal. Rptr. 456, 463 (1986) (holding that even if directors of nonprofit corporations are not compensated, they are not exonerated from liability for a breach of duty); CAL. CORP. CODE § 7230(a) (West Supp. 1990) (stating that duties and liabilities of director apply whether or not a director is compensated by the corporation).

2. *See* CAL. CORP. CODE §§ 5239(b), 7231.5(b), 9247(b) (amended by Chapter 107) (definition of volunteer).

3. *See id.* § 5047 (West Supp. 1990) (definition of a director of a nonprofit corporation).

4. *See id.* § 312(b) (West 1977) (election of corporate officers). Prior to the enactment of Chapter 107, the immunity applied to the president, vice president, secretary, or treasurer assisting in establishing the policy of a corporation. 1979 Cal. Stat. ch. 567, sec. 24, at 2242 (amending CAL. CORP. CODE § 5231.5(c)) (repealed by Chapter 107). Chapter 107 extends the immunity to any individual serving in a capacity similar to that of a president, vice president, secretary, or treasurer assisting in establishing the policy of a corporation. CAL. CORP. CODE §§ 7231.5(c), 9247(c) (amended by Chapter 107).



subject to California's nonprofit corporations laws.<sup>6</sup> Existing law allows the immunity to apply only if the nonprofit corporation maintains general liability insurance.<sup>7</sup> Under Chapter 107, the immunity applies only if the claim made against the director or officer may also be made directly against the corporation.<sup>8</sup>

Under existing law, if a volunteer director or officer is not immune, a negligence action is prohibited unless court permission is obtained.<sup>9</sup> Chapter 107 specifies who will qualify as a volunteer for purposes of applying this restriction.<sup>10</sup>

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5. See CAL. CORP. CODE § 5047.5(e) (amended by Chapter 107) (immunity provided to nonprofit corporations organized to provide charitable, educational, scientific, and social forms of public service). Chapter 107 extends the immunity to nonprofit corporations organized to provide religious and literary services. *Id.* See also *id.* §§ 5059 (West Supp. 1990) (definition of nonprofit mutual benefit corporation); 5060 (definition of nonprofit public benefit corporation); 5061 (definition of nonprofit religious corporation).

6. CAL. CIV. PROC. CODE § 425.15 (amended by Chapter 107); CAL. CORP. CODE § 5047.5 (amended by Chapter 107). See generally *Review of Selected 1989 California Legislation*, 21 PAC. L.J. 333, 374 (1990) (analysis of legislation expanding qualified immunity for volunteer directors and officers of nonprofit corporations incorporated pursuant to California's nonprofit corporation laws to volunteer directors and officers of nonprofit corporations *subject to* nonprofit corporation laws).

7. CAL. CORP. CODE § 5047.5(e) (amended by Chapter 107). The insurance policy must be in force at the time of injury and at the time the claim against the corporation is made. *Id.* If the corporation's insurance policy covers the damages caused by the director or officer, no cause of action may be maintained against the director or officer. *Id.*

8. *Id.* § 5047.5(e)(2) (amended by Chapter 107).

9. CAL. CIV. PROC. CODE § 425.15 (amended by Chapter 107). The court may allow an action to be brought only if it determines that the plaintiff has established evidence that substantiates the claim. *Id.* The restriction applies only to negligence actions based on acts or omissions by the director or officer within the scope of that person's duties. *Id.*

10. *Id.* § 425.15(d) (amended by Chapter 107). A director or officer is a volunteer unless they receive a salary, fee, or other consideration for services rendered. *Id.* Cf. CAL. CORP. CODE §§ 5239(b), 7231.5(b), 9247(b) (amended by Chapter 107) (definition of volunteer).

## **Business Associations and Professions; physicians and surgeons--treatment of intractable pain**

Business and Professions Code § 2241.5 (new).

SB 1802 (Greene); 1990 STAT. Ch. 1588

Support: Union of Physicians and Dentists

Under existing law, it is unprofessional conduct and grounds for disciplinary action for physicians and surgeons<sup>1</sup> to excessively prescribe, furnish, or administer drugs or treatment.<sup>2</sup> Chapter 1588 allows physicians and surgeons to prescribe or administer controlled substances<sup>3</sup> to a person diagnosed with a condition causing intractable pain.<sup>4</sup>

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1. See CAL. BUS. & PROF. CODE § 4033 (West 1990) (definition of physicians). Cf. CAL. HEALTH & SAFETY CODE § 11024 (West 1975) (similar definition of physician). See also CAL. BUS. & PROF. CODE §§ 2051 (West 1990) (physician's and surgeon's certificate authorizing the holder to use drugs or devices upon human beings, sever tissues, and use any other method in the treatment of diseases, injuries, or deformities); 2041 (licensee is a holder of a physician's and surgeon's certificate that is engaged in the professional practice authorized by the certificate); 2050 (all physicians and surgeons licensed by the Medical Board of California will be issued a "physician's and surgeon's certificate").

2. CAL. BUS. & PROF. CODE § 725. Any person who excessively prescribes or administers drugs or treatment is guilty of a misdemeanor and may be punished by fine and imprisonment. *Id.*

3. See CAL. HEALTH & SAFETY CODE § 11007 (West Supp. 1990) (definition of controlled substance). See also *id.* §§ 11000-11853 (West 1975 & Supp. 1990) (California Uniform Controlled Substances Act); 11054-11058 (West Supp. 1990) (controlled substances schedules). Cf. 21 U.S.C. §§ 801a (1988) (Congressional findings and declarations regarding controlled substances); § 812 (schedules of controlled substances).

4. CAL. BUS. & PROF. CODE § 2241.5(a) (enacted by Chapter 1588). Physicians and surgeons are not subject to disciplinary action by the Medical Board of California for prescribing or administering controlled substances in the course of treatment for intractable pain. *Id.* § 2241.5(c) (enacted by Chapter 1588). Chapter 1588 does not apply to treatment of any person in a health facility that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness. *Id.* § 2241.5(g) (enacted by Chapter 1588). See *id.* § 2241.5(b) (enacted by Chapter 1588) (definition of intractable pain as a state of pain where the cause of the pain cannot be removed or otherwise treated and, in the generally accepted course of medical practice, no relief or cure is possible or none has been found). See also CAL. HEALTH & SAFETY CODE § 1250 (West 1990) (definition of health facility). Cf. 1989 Tex. Sess. Law. Serv., 1st called session, 5 (Vernon) (Intractable Pain Treatment Act similar to Chapter 1588).

Chapter 1588 does not apply to persons being treated for chemical dependency.<sup>5</sup> Further, Chapter 1588 does not authorize a physician or surgeon to prescribe or administer controlled substances to a person whom the physician or surgeon knows is using drugs or other substances for nontherapeutic purposes.<sup>6</sup>

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## **Business Associations and Professions; prescription drugs--labeling**

Business and Professions Code § 4047.9 (amended).  
AB 3276 (Bronzan); 1990 STAT. Ch. 641  
Support: California Senior Legislature

Existing law requires pharmacists<sup>1</sup> to inform a patient of the harmful effects of a prescription drug, if the drug poses a substantial risk to the person consuming the drug when the drug is combined with alcohol.<sup>2</sup> Chapter 641 requires pharmacists to provide a label or enclosure with prescription drug containers whenever a prescribed drug has not been previously dispensed to

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5. CAL. HEALTH & SAFETY CODE § 2241.5(d) (enacted by Chapter 1588). The Medical Board of California may deny, revoke, or suspend the license of any physician and surgeon who prescribes or administers a controlled substance or treatment that is nontherapeutic, fails to keep complete and accurate records of purchases and disposal of controlled substances, writes false prescriptions for controlled substances, or prescribes, administers, or dispenses controlled substances that are not consistent with public health and welfare. *Id.* § 2241.5(f) (enacted by Chapter 1588).

6. *Id.* § 2241.5(e) (enacted by Chapter 1588).

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1. See CAL. BUS. & PROF. CODE § 4033 (West 1990) (definition of pharmacist).

2. *Id.* § 4047.9 (amended by Chapter 641). Existing law also requires pharmacists to inform a patient if the drug may impair the patient's ability to drive a motor vehicle. *Id.* However, there are no pharmacist disclosure requirements for adverse effects of the drug in emergency cases, or if the patient is registered for treatment in a general acute care hospital, acute psychiatric hospital, or special hospital. *Id.* See CAL. HEALTH & SAFETY CODE §§ 1250(a) (West 1990) (definition of general acute care hospital); 1250(b) (definition of acute psychiatric hospital); 1250(f) (definition of special hospital).

the patient.<sup>3</sup> Chapter 641 also applies if a prescribed drug has been dispensed to the patient in a different dosage, form, strength, or with different written instructions.<sup>4</sup>

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## **Business Associations and Professions; professional corporations**

Corporations Code § 13401.5 (amended).  
AB 3324 (Hunter); 1990 STAT. Ch. 1691

Existing law permits licensed members<sup>1</sup> of certain professions<sup>2</sup> to be shareholders, officers, directors, or professional employees of specified professional corporations.<sup>3</sup> Chapter 1691 extends these provisions to include licensed chiropractors.<sup>4</sup>

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3. CAL. BUS. & PROF. CODE § 4047.9(c) (amended by Chapter 641). The label or enclosure must read "Consult your pharmacist or physician with a list of medications you are currently taking if you have any questions about adverse drug reactions." *Id.* Pharmacists are not required to provide a label or enclosure with drugs furnished in conjunction with treatment or emergency services provided in a general acute care hospital, acute psychiatric hospital, or special hospital. *Id.* § 4047.9(d) (amended by Chapter 641). *Cf.* 24 C.F.R. §§ 201.50-201.59 (1990) (federal labeling requirements for prescription drugs and insulin).

4. CAL. BUS. & PROF. CODE § 4047.9(c) (amended by Chapter 641).

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1. See CAL. CORP. CODE § 13401(c) (West Supp. 1990) (definition of licensed persons).

2. See *id.* § 13401(a) (definition of professional services).

3. *Id.* § 13401.5 (amended by Chapter 1691). See *id.* § 13401(b) (West Supp. 1990) (definition of professional corporation).

4. CAL. CORP. CODE § 13401.5 (amended by Chapter 1691). Chapter 1691 permits licensed members of the profession to be shareholders, officers, directors, or professional employees of the professional corporation. *Id.* The shares owned by licensed chiropractors may not exceed 49% of the total shares of the professional corporation. *Id.* See CAL. BUS. & PROF. CODE § 1000-5 (West 1990) (requirements for receipt of a chiropractor's license). *Cf.* DEL. CODE ANN. tit. 8, § 603 (1983); FLA. STAT. ANN. § 621.03 (West Supp. 1990); MICH. COMP. LAWS ANN. § 450.222 (West 1990); N.J. STAT. ANN. § 14A:17-3 (West Supp. 1990); N.M. STAT. ANN. § 53-6-3 (1978) (shareholders of professional corporations must be duly licensed members of the profession); WASH. REV. CODE ANN. § 18.100.065 (West 1989) (all directors and officers of a professional corporation, other than the secretary and treasurer, must be duly licensed members of the profession).

## **Business Associations and Professions; public works contractors--disciplinary actions**

Business and Professions Code § 7115 (amended); Public Contract Code § 10300 (repealed); § 100 (amended).  
SB 2290 (Seymour); 1990 STAT. Ch. 485

Under existing law, failure to comply with the provisions of the Contractor's State License Law<sup>1</sup> is cause for disciplinary action.<sup>2</sup> Under Chapter 485, failure to comply with the requirements of a noncollusion affidavit in a public works contract is also cause for disciplinary action.<sup>3</sup>

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## **Business Associations and Professions; real estate appraisers--licensing**

Business and Professions Code §§ 11300, 11301, 11302, 11310, 11311, 11312, 11313, 11314, 11320, 11321, 11321, 11323, 11324, 11325, 11340, 11341, 11342, 11350, 11351, 11360, 11361, 11400, 11401, 11402, 11403, 11404, 11405, 11406, 11407, 11408, 11410, 11411, 11412, 11421, 11422 (new); Civil Code §§ 1922, 1922.1, 1922.2, 1922.4, 1922.6, 1922.8, 1922.10, 1922.11, 1922.12, 1922.13, 1922.14 (repealed).

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1. See CAL. BUS. & PROF. CODE §§ 7000-7173 (West 1975 & Supp. 1990) (Contractor's State License Law).

2. *Id.* § 7115(a) (amended by Chapter 485). See *id.* §§ 7090 (West Supp. 1990). The Registrar of Contractors may investigate the actions of any contractor and suspend any license or registration upon finding that the contractor is guilty of an act necessitating disciplinary action. *Id.* See *id.* § 7095 (West 1975) (modes of discipline). See also *Contractor's State License Bd. v. Superior Court*, 187 Cal. App. 2d 557, 558, 10 Cal. Rptr. 95, 96-97 (1960) (the Registrar of Contractors has a duty to take disciplinary action upon discovering acts that are grounds for disciplinary action).

3. CAL. BUS. & PROF. CODE § 7115 (amended by Chapter 485). See CAL. PUB. CONT. CODE § 7106 (West Supp. 1990) (requiring noncollusion affidavit to be included with a public contract bid and listing form of affidavit).

AB 527 (Hannigan); 1990 STAT. Ch. 491

The federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)<sup>1</sup> requires real estate appraisers performing appraisals in federally related transactions<sup>2</sup> to have demonstrated competence in the appraisal field, and to be subject to state supervision.<sup>3</sup> Chapter 491, by enacting the Real Estate Appraisers Licensing and Certification Law (REALCL),<sup>4</sup> appears to be a response to FIRREA.<sup>5</sup> Chapter 491 creates the Office of Real Estate Appraisers (Office),<sup>6</sup> and requires the Director of the Office to be responsible for the administration of the REALCL.<sup>7</sup>

Prior state law, the Lancaster-Montoya Appraisal Act of 1986, established standards for the certification of appraisals and

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1. See 12 U.S.C.A. §§ 3331-3351 (West 1989). FIRREA was signed into federal law on August 9, 1989. Banking Daily (BNA), Aug. 10, 1989, at 1.

2. See CAL. BUS. & PROF. CODE § 11302(l) (enacted by Chapter 491) (definition of federally related transaction). Federal Housing Authority, Veterans Administration, and Farmers' Home Administration loan programs are among those transactions that are federally related. Los Angeles Times, June 18, 1989, at 17, col. 1.

3. 12 U.S.C.A. §§ 3331, 3342, 3343 (West 1989).

4. See CAL. BUS. & PROF. CODE § 11300 (enacted by Chapter 491). Several other states have enacted legislation requiring the licensing or certification of real estate appraisers. See, e.g., CONN. GEN. STAT. §§ 20-312 (1988); FLA. STAT. ANN. § 475.500 (West 1989); 1989 Minn. Laws 341; NEB. REV. STAT. § 81-8,276 (1987); OR. REV. STAT. § 696.162 (1987). See also 1989 PAC. L.J. REV. NEV. LEGIS. 13 (analysis of Nevada real estate appraiser licensing law).

5. See 1990 Cal. Stat. ch. 491, sec. 4, at \_\_\_\_ (declaration of legislative intent to comply with FIRREA). FIRREA allows states to establish real estate appraiser certifying and licensing agencies to assure the availability of state licensed and certified appraisers for the performance of appraisals in federally related transactions. 12 U.S.C.A. § 3346 (West 1989). FIRREA also creates an oversight committee to monitor state licensing and certification agencies. *Id.* § 3347 (b)-(c). The oversight committee may refuse to recognize a state's certifications and licenses by giving written notice to the appropriate state agency that expresses disapproval of the agency's enforcement standards or policies. *Id.*

6. CAL. BUS. & PROF. CODE § 11301(a) (enacted by Chapter 491).

7. *Id.* § 11310 (enacted by Chapter 491). The Director is not permitted to be actively engaged in the appraisal field during the term as Director and for one year following that term. *Id.* § 11310 (b) (enacted by Chapter 491). Additionally, the Director is granted the power to enact and enforce rules that are reasonably necessary for the administration of the Office, subject to the guidelines set by the Office of Administrative Law. *Id.* § 11313 (enacted by Chapter 491).

appraisal reports.<sup>8</sup> Chapter 491 requires persons performing federally related real estate appraisal activities,<sup>9</sup> or claiming to be real estate appraisers,<sup>10</sup> to obtain a real estate appraiser license or a certificate<sup>11</sup> as a state certified real estate appraiser.<sup>12</sup> Chapter 491 prohibits real estate appraisers or state certified appraisers from conducting any appraisal activities related to a transfer of real estate if the amount of the appraiser's compensation is affected by the sales commission stemming from the transfer of the real estate appraised.<sup>13</sup> Chapter 491 allows persons that are not state licensed or state certified appraisers to assist in the preparation<sup>14</sup> of appraisals<sup>15</sup> if specified circumstances exist.<sup>16</sup>

FIRREA requires a state certified appraiser to perform any appraisal in federally related transactions valued over \$1,000,000, or in transactions that a federal agency considers sufficiently important.<sup>17</sup> Chapter 491 requires the Director of the Office of Real Estate Appraisers to establish procedures and regulations to enable individuals to apply for a real estate appraiser license and certificate.<sup>18</sup> Chapter 491 additionally requires persons renewing

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8. See 1986 Cal. Stat. ch. 372, sec. 1, at 307 (enacting CAL. CIV. CODE §§ 1922-1922.14) (repealed by 1990 Cal. Stat. ch. 491, sec. 2, at ).

9. See CAL. BUS. & PROF. CODE § 11302(k) (enacted by Chapter 491) (definition of federally related real estate appraisal activity).

10. See *id.* § 11302(n) (enacted by Chapter 491) (definition of real estate appraiser).

11. See *id.* § 11302(e) (enacted by Chapter 491) (definition of certificate).

12. *Id.* § 11320 (enacted by Chapter 491). See *id.* § 11302(p) (enacted by Chapter 491) (definition of state certified real estate appraiser). See also CAL. PUB. RES. CODE § 750 (West 1984) (additional provisions applicable for other specialized training requirements and licensure that were not repealed by Chapter 491).

13. CAL. BUS. & PROF. CODE § 11323 (enacted by Chapter 491).

14. See *id.* § 11324(c) (enacted by Chapter 491) (definition of assists in the preparation).

15. See *id.* § 11302(b) (enacted by Chapter 491) (definition of appraisal).

16. *Id.* § 11324 (enacted by Chapter 491). The person must work under the direct supervision of either a licensed or certified appraiser that has signed and accepted full responsibility for the appraisal. *Id.*

17. 12 U.S.C.A. § 3342 (West 1989). The importance of the transaction is based on financial or public policy considerations. *Id.*

18. *Id.* § 11340 (enacted by Chapter 491). The regulations must, at a minimum, include guidelines for necessary education, experience, or equivalency. *Id.* The regulations established by the Director must, at a minimum, meet the requirements set forth by the Appraisal Foundation. *Id.* See *id.* § 11302(c) (enacted by Chapter 491) (definition of Appraisal Foundation).

either a license or a certificate to comply with the continuing education requirements of the Appraisal Foundation.<sup>19</sup>

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## **Business Associations and Professions; real estate brokers--mobilehome sales**

Business and Professions Code § 10131.6 (amended).  
AB 3183 (Bader); 1990 STAT. Ch. 1689

Under prior law, a licensed real estate broker<sup>1</sup> could engage in specified mobilehome<sup>2</sup> sales activities only if the mobilehome had been registered for at least one year.<sup>3</sup> Chapter 1689 abolishes the one year registration requirement for mobilehomes as applied to sales by real estate brokers.<sup>4</sup>

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19. *Id.* § 11360 (enacted by Chapter 491).

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1. *See* CAL. BUS. & PROF. CODE § 10131 (West 1987) (definition of a real estate broker).

2. *See id.* § 10131.6(c) (amended by Chapter 1689) (definition of mobilehome). *See also* CAL. HEALTH & SAFETY CODE § 18008 (West Supp. 1990) (similar definition of mobilehome).

3. 1985 Cal. Stat. ch. 106, sec. 8, at 153 (amending CAL. BUS. & PROF. CODE § 10131.6) (amended by Chapter 1689). The mobilehome was to be registered for at least one year under the Mobilehomes-Manufactured Housing Act of 1980. *Id.* *See* CAL. HEALTH & SAFETY CODE §§ 18075-18122 (West 1984 & Supp. 1990) (registration and titling requirements for mobilehomes).

4. CAL. BUS. & PROF. CODE § 10131.6(a) (amended by Chapter 1689).



## **Business Associations and Professions; real estate licenses**

Business and Professions Code § 10177 (amended).

AB 3594 (Speier); 1990 STAT. Ch. 1335

Opposition: Department of Real Estate

Existing law authorizes the Real Estate Commissioner<sup>1</sup> to regulate the issuance and revocation of all real estate licenses.<sup>2</sup> Existing law specifies the grounds for revocation or suspension of a real estate license.<sup>3</sup> Chapter 1335 provides additional grounds for the revocation or suspension of a real estate license when a real estate licensee<sup>4</sup> who acts as an agent for a buyer fails to disclose to the buyer any direct or indirect interest<sup>5</sup> held by the real estate licensee in the property.<sup>6</sup>

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1. See CAL. BUS. & PROF. CODE § 10050-10086 (West 1987 & Supp. 1990) (appointment, qualifications, and general duties of the Real Estate Commissioner).

2. *Id.* § 10071 (West 1987). See *id.* §§ 10150-10167.17 (West 1987 & Supp. 1990) (general real estate license requirements and regulations).

3. *Id.* §§ 10176-10177 (West 1987 & Supp. 1990). See *id.* §§ 10175-10185 (general requirements and regulations of disciplinary actions).

4. See *id.* § 10014 (West 1987) (definition of real estate licensee).

5. See *id.* § 10177(o) (amended by Chapter 1335) ("direct or indirect interest" is defined to include a licensee's direct or indirect ownership in the property; or the direct or indirect ownership in the property by: a person related to the licensee by blood or marriage, an entity in which the licensee has an ownership interest, or any other person with whom the licensee occupies a special relationship).

6. *Id.* § 10177(o) (amended by Chapter 1335). Nothing in Chapter 1335 is intended to broaden or limit the authority of the Commissioner of Real Estate to take disciplinary actions under section 10176 of the California Business and Professions Code. 1990 Cal. Stat. ch. 1335, sec. 2, at \_\_\_\_\_. See *Chodur v. Edmonds*, 174 Cal. App. 3d 565, 571, 220 Cal. Rptr. 80, 84 (1985) (an agent is a fiduciary and the agent's obligation of diligent and faithful service is the same as that of a trustee). An agent is required, as a fiduciary, to disclose to the principal all known information relevant to the subject matter of the agency. *Id.* See generally *Litchfield, Unprofessional Conduct by Real Estate Brokers: Conflict of Interest and Conflict in the Law*, 11 PAC. L.J. 821 (1980) (discussion of the fiduciary nature of the real estate broker's duty to his client).

## **Business Associations and Professions; regulation of state-chartered savings associations**

Financial Code § 5304 (repealed); §§ 5100.5, 7350, 8160, 8200, 8201 (repealed and new); §§ 5100.2, 5100.6, 5100.7, 5100.8, 5100.9, 5301, 5302, 5304, 5305, 5306, 5307, 5310, 5311, 5320, 5321, 5322, 5323, 5324, 5325, 5330, 6157, 6502.5, 6525.5, 6529, 6530, 6653.5, 7250.5, 7505.5, 8202 (new); §§ 5300, 5301, 5302 (amended and renumbered); §§ 3361, 5102, 5303, 5606, 5624, 5652, 5705, 5758, 5801, 5865, 6202, 6503, 6528, 7250, 7252, 7451, 7453, 7507, 7509, 8156, 8253, 10000, 10010 (amended).

AB 3643 (Johnston); 1990 STAT. Ch. 1118

### **CRIMINAL PENALTIES**

Existing law imposes criminal penalties on persons who knowingly publish a false statement calculated to injure the business reputation of a savings association (association),<sup>1</sup> or make a false statement for the purpose of influencing the action of an association on specified transactions.<sup>2</sup>

Under Chapter 1118, any officer, employee, or agent of an association who willfully falsifies, omits, or alters any association record with the intent to deceive an officer of the association, or an examiner employed to examine the association's affairs, is subject to imprisonment and a maximum fine of \$1,000,000 for each day

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1. CAL. FIN. CODE § 5307 (amended and renumbered by 1990 Cal. Stat. ch 1118, section 9).

2. *Id.* § 5308 (amended and renumbered by Chapter 1118). Specified transactions include an application, advance, discount, purchase, or loan; or the acceptance, deferment, release, or substitution of security for these transactions. *Id.* A violation of these provisions is punishable by a fine not greater than \$10,000, imprisonment for up to one year in the county jail, or both. *Id.* Also, under existing law a person who willfully fails to comply with a provision of the Savings Associations Law is guilty of a public offense. *Id.* § 5300 (amended and renumbered by Chapter 1118). See CAL. PEN. CODE § 15 (West 1988) (definition of public offense).

the violation continues.<sup>3</sup> Chapter 1118 extends this punishment to the following acts: (1) Bribery of, or offering to bribe, an institution-affiliated party<sup>4</sup> (Affiliated Party); solicitation or acceptance of a bribe by an Affiliated Party intending to influence the business of a savings association;<sup>5</sup> (3) theft or misapplication of the money, property, or credit of the savings association by an Affiliated Party;<sup>6</sup> and (4) knowingly defrauding, or attempting to defraud a savings association by any person.<sup>7</sup> Any person

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3. CAL. FIN. CODE § 5303 (amended by Chapter 1118). *Cf.* 18 U.S.C.A. § 1005 (West Supp. 1990) (similar prohibitions in federal savings and loan laws); *United States v. Gleason*, 616 F.2d 2, 29 (2nd Cir. 1979), *cert denied*, 444 U.S. 1084 (1980) (citing *Agnew v. United States*, 165 U.S. 36 (1897)) (United States Code title 18, section 1005 can be violated by entering an accurate entry of a transaction known to be fraudulent); *United States v. Ericson*, 601 F.2d 296, 302 (7th Cir. 1979) (an entry recording an actual transaction not a false entry even though part of a fraudulent or illegal scheme). *See* ASSEMBLY OFFICE OF RESEARCH, MORTGAGING THE THRIFT INDUSTRY: A HISTORY OF SAVINGS AND LOANS at 23-24 (Feb. 1990) [hereinafter THRIFT INDUSTRY]. *See also* CAL. FIN. CODE §§ 5304, 5305, 5306 (enacted by Chapter 1118) (violations of this provision of Chapter 1118 are punishable by imprisonment for two, three, or four years); *infra* notes 5-7 and accompanying text (discussing California Financial Code sections 5304 through 5306).

4. CAL. FIN. CODE § 5304 (enacted by Chapter 1118). *See id.* § 5100.9 (enacted by Chapter 1118) (definition of institution-affiliated party). This definition includes independent contractors who recklessly participate in: (1) A violation of law or regulation; (2) a breach of fiduciary duty; or (3) an unsafe or unsound practice. *Id.* § 5100.9(d) (enacted by Chapter 1118). *Cf.* 12 U.S.C.A. § 1813(u) (West 1989) (federal definition of institution-affiliated party).

5. CAL. FIN. CODE § 5304 (enacted by Chapter 1118). If the value of the property offered, promised, or demanded is \$1,000 or less, the offense is punishable by a fine of up to \$1,000, imprisonment in the county jail for one year, or both. *Id.* § 5304(c) (enacted by Chapter 1118). This penalty does not apply to the solicitation or acceptance of a bona fide salary or other compensation paid in the usual course of business, or where the value of the property is \$100 or less. *Id.* § 5304(d) (enacted by Chapter 1118). *Cf.* 18 U.S.C.A. § 215 (West Supp. 1990) (similar federal bribery statute); *United States v. Lane*, 464 F.2d 593, 595 (8th Cir. 1972), *cert denied*, 409 U.S. 876 (1972) (purpose of United States Code title 18, section 215 is to protect deposits by preventing unsound loans made by officers and directors of a bank; Congress is not interested in who receives the commission, but merely in protecting loan transactions from such practice); *United States v. Brunson*, 882 F.2d 151, 154 (5th Cir. 1989) (statute is not unconstitutionally vague).

6. CAL. FIN. CODE § 5305 (enacted by Chapter 1118). If the amount is \$100 or less the violation is punishable by a fine of up to \$1,000, imprisonment of up to one year, or both. *Id.* *Cf.* CAL. PENAL CODE §§ 503-514 (West 1986) (statutes relating to embezzlement).

7. CAL. FIN. CODE § 5306 (enacted by Chapter 1118). *Cf.* 18 U.S.C.A. § 1344 (West Supp. 1990) (crime to defraud a financial institution); *United States v. Goldblatt*, 813 F.2d 619, 624 (3rd Cir. 1987) (citing *United States v. Toney*, 598 F.2d 1349, 1357 n.12 (5th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1983)) ("scheme" and "artifice" defined to include any plan, pattern, or cause of action intended to deceive others in order to obtain something of value from the institution deceived); 18 U.S.C.A. § 1346 (West Supp. 1990) (definition of scheme or artifice to defraud).

violating, or conspiring to violate any of the above provisions is subject to a civil fine of up to \$5,000,000, to be assessed by the court in a civil action.<sup>8</sup> In addition, Chapter 1118 prohibits any person convicted of an offense involving dishonesty from participating in the conduct of the affairs of an association without the prior written consent of the Savings and Loan Commissioner (Commissioner).<sup>9</sup>

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8. CAL. FIN. CODE § 5310 (enacted by Chapter 1118). The defendant's ability to pay, the seriousness of the offense, and the amount of gain to the defendant are to be considered by a court in determining the amount of the fine or penalty. *Id.* § 5311(a) (enacted by Chapter 1118). The California Attorney General is to bring an action for these penalties, and establish guilt by a preponderance of the evidence. *Id.* § 5310(c) (enacted by Chapter X). *Cf.* 12 U.S.C.A. § 1833a (West 1989) (similar civil penalties for specified violations of Title 18); HOUSE COMM. ON THE JUDICIARY, FINANCIAL INSTITUTIONS REFORM, RECOVERY AND ENFORCEMENT ACT OF 1989, H. REP. NO. 54 PART 5, 101st Cong., 1st Sess. 5-7, *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 86, 268 (House Judiciary Committee amendment to "preponderance of the evidence" because further amendments (not adopted in Public Law 101-73) made penalty "clearly remedial and civil" rather than "punitive"). The House Committee on the Judiciary was also of the opinion that the penalty could be construed by the courts as a criminal penalty, thus making a conviction unconstitutional on the grounds of double jeopardy and failure to provide for criminal standards. *Id.* See *United States v. Halper*, 109 S. Ct. 1892, 1901 n.7 (1989) (whether sanction is civil or criminal is determined by purpose served by sanction, not the underlying nature of the proceeding giving rise to the sanction). If a person has been punished by a fine or imprisonment, a civil penalty may not be imposed for the same violation. CAL. FIN. CODE § 5311(b) (enacted by Chapter 1118). See also *Halper*, 109 S. Ct. at 1902 (a defendant punished in a criminal prosecution may not be subject to additional civil sanctions if the sanction may be characterized only as deterrent or retribution; if a civil sanction does not serve solely remedial purposes, but also serves retributive or deterrent purposes, it is a punishment). But see *id.* (case limited to fixed penalty provisions for prolific "small-gauge" offenders where sanctions overwhelmingly disproportionate to the damages).

9. CAL. FIN. CODE § 5302(a) (enacted by Chapter 1118) (incorporating CAL. FIN. CODE § 6525.5 (enacted by Chapter 1118)). Violations are punishable by fines of up to \$1 million per day for each day the violation continues. *Id.* Associations who permit persons convicted of an offense involving dishonesty to participate in the conduct of their affairs are also subject to imprisonment for two, three, or four years. *Id.* See *id.* § 6525.5 (enacted by Chapter 1118) (prohibition of persons convicted of an offense involving dishonesty from participation in the affairs of associations). *Cf.* 12 U.S.C.A. § 1829 (West 1989) (similar penalty for participation in the affairs of an association by a person convicted of an offense involving dishonesty); *Federal Deposit Ins. Corp. v. Mallen*, 661 F. Supp. 1003, 1007-08 (N.D. Iowa 1987) (United States Code title 18, section 1829 applies to current, as well as prospective employees; conviction does not require exhaustion of direct appeals). Persons who knowingly violate a removal or prohibition order of the Commissioner can be punished by similar sanctions. CAL. FIN. CODE § 5302(b) (enacted by Chapter 1118). See *infra* notes 38-40 and accompanying text (discussing cease and desist orders issued by the Commissioner).

## CRIMINAL FORFEITURE

Under Chapter 1118, violators of any of the previously discussed provisions forfeit<sup>10</sup> any property derived from the proceeds of the violation.<sup>11</sup> At the forfeiture proceeding, proof beyond a reasonable doubt of the underlying violation is required to impose the forfeiture.<sup>12</sup> If the issue of forfeiture is to be tried to a jury,<sup>13</sup> the jury's verdict must be unanimous.<sup>14</sup>

## CIVIL PENALTIES

Any association or Affiliated Party that violates a statute or any regulation, order, or condition issued or imposed by the Commissioner must pay a civil penalty of up to \$5,000 for each day the violation continues.<sup>15</sup> If this violation is part of a pattern of misconduct, causes more than a minimal loss to the savings association, or is committed by an Affiliated Party and results in

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10. See CAL. FIN. CODE §§ 5320-5325 (enacted by Chapter 1118) (providing for forfeiture proceedings).

11. *Id.* § 5320 (enacted by Chapter 1118). Cf. CAL. PENAL CODE § 186.3(a) (West 1988) (all proceeds from a pattern of criminal profiteering activity are subject to forfeiture on conviction of the underlying offense); Schons, *Asset Forfeiture in California: A Preview of AB 4162*, 11 PROC. BRIEF 5 (1988) (discussing forfeiture under California Health and Safety Code sections 11470-11493 for controlled substance violations). Compare CAL. FIN. CODE § 5320 (enacted by Chapter 1118) with 18 U.S.C.A. § 982(a)(2), (b) (West Supp. 1990) (forfeiture for specified violations affecting financial institutions). Cf. generally CAL. PENAL CODE §§ 186.3-186.8 (West 1988) (California Control of Profits of Organized Crime Act); *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 357, 559-62 (1983) (discussion of California Penal Code sections 186 through 186.6 (California Control of Profits of Organized Crime Act)).

12. CAL. FIN. CODE § 5322(d) (enacted by Chapter 1118).

13. *Id.* § 5322(c)(2) (enacted by Chapter 1118). A jury trial may be waived with the consent of all parties. *Id.*

14. *Id.* § 5322(d) (enacted by Chapter 1118). Under Chapter 1118, third persons who have an interest in the property subject to forfeiture must be given notice by personal service or registered mail. *Id.* 5321(a) (enacted by Chapter 1118). If notice cannot be given in this way, notice must be published for at least three weeks in a newspaper of general circulation in the county where the property is located. *Id.* Bona fide purchasers for value, persons holding a valid lien, mortgage, or interest in the property are protected. *Id.* § 5324(a), (b) (enacted by Chapter 1118).

15. *Id.* § 5330(a) (enacted by Chapter 1118). Cf. 12 U.S.C.A. § 1818(i)(2)(A) (West 1989) (similar "first tier" of federal civil penalty provisions).

gain to that party, the maximum civil penalty is \$25,000 per day.<sup>16</sup> If the Affiliated Party commits the violation knowingly, recklessly causes a substantial loss to an association, or if the violation results in a substantial gain to an Affiliated Party, Chapter 1118 permits the Commissioner to impose civil penalties of up to \$1,000,000.<sup>17</sup>

Under prior law, if an association failed to furnish the Commissioner with any required report within five days of the due date, the Commissioner could impose daily penalties of up to \$1,000.<sup>18</sup> Under Chapter 1118, associations that fail to make or publish a report required by the Commissioner, or that submit or publish a false report, are subject to a civil penalty of up to \$20,000 per day.<sup>19</sup>

### SAVINGS ASSOCIATION REGULATION

Chapter 1118 limits the transactions that can be entered into between an association and affiliated persons<sup>20</sup> without the prior

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16. CAL. FIN. CODE § 5330(b) (enacted by Chapter 1118). *Cf.* 12 U.S.C.A. § 1818(i)(2)(B) (West 1989) (similar "second tier" of federal penalty provisions).

17. CAL. FIN. CODE § 5330(c)-(e)(1) (enacted by Chapter 1118). *Cf.* 12 U.S.C.A. § 1818(i)(2)(C)-(D)(i) (West 1989) (similar "third tier" of federal penalty provisions). In the case of a savings institution, the amount of the civil penalty cannot exceed the lesser of \$1 million or one percent of the total assets of the association. CAL. FIN. CODE § 5330(e) (enacted by Chapter 1118). These penalties may be assessed by written notice, and the Commissioner may modify or reduce any penalty. CAL. FIN. CODE § 5330(d)-(e) (enacted by Chapter 1118). In determining the amount of the civil penalty, the Commissioner must consider the size of the financial resources of the association or person charged, the gravity of the violation, and any history of previous violations. *Id.* § 5330(f) (enacted by Chapter 1118).

18. 1983 Cal. Stat. ch. 1091, sec. 2, at 3955 (enacting CAL. FIN. CODE § 8160) (repealed by Chapter 1118). Prior law also permitted the Commissioner to grant an extension of time with a showing of good cause. *Id.*

19. CAL. FIN. CODE § 8160(a)-(b) (enacted by Chapter 1118). Chapter 1118 provides for civil penalties not to exceed \$2,000 per day if the association has adopted procedures for the prevention of inadvertent error, and the failure or mistake is the result of such an error. *Id.* § 8160(a) (enacted by Chapter 1118). The Commissioner may assess a civil penalty of up to \$1 million against an association that publishes a report with reckless disregard of its accuracy and the report contains false or misleading information. *Id.* § 8160(c) (enacted by Chapter 1118). *Cf.* 12 U.S.C.A. 164 (West Supp. 1990) (three-tier penalty system for associations that fail to make reports).

20. *See* § CAL. FIN. CODE § 5100.5 (enacted by Chapter 1118) (definition of affiliated person). *Cf.* § 5100.9 (enacted by Chapter 1118) (definition of institution-affiliated party).

written consent of the Commissioner.<sup>21</sup> The limited transactions include buying, leasing, or selling real or personal property; gifts of such property; and consulting or services contracts.<sup>22</sup> Chapter 1118 also prohibits compensating an affiliated person for procuring a loan.<sup>23</sup> A savings association is prohibited from discharging or discriminating against an employee<sup>24</sup> whistleblower,<sup>25</sup> and gives whistleblowers the right to file a civil action for reinstatement, compensatory damages, and other appropriate remedies.<sup>26</sup> A troubled association<sup>27</sup> may not accept a brokered deposit,<sup>28</sup> unless the Commissioner has waived this prohibition.<sup>29</sup>

Under existing law, an association may invest a maximum of five percent of its assets in any securities it deems prudent.<sup>30</sup> Chapter 1118 limits this discretion by prohibiting an association for

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21. *Id.* § 6503(a) (amended by Chapter 1118). *Cf.* 12 C.F.R. § 563.43 (1990) (similar federal restrictions for affiliated persons). Before giving written consent, the Commissioner must find that the transaction is fair and in the best interest of the association, and that the transaction was approved by a majority of the entire board of directors. CAL. FIN. CODE § 6503(b)(1)-(2) (amended by Chapter 1118). None of the directors may have an interest in the transaction. *Id.* See THRIFT INDUSTRY, *supra* note 3, at 23-24 (insider abuse prevalent among failed thrifts); *id.* at 30 (recommending legislation to restrict insider transactions). *Cf.* H. REP. NO. 54(I), 101st Cong., 1st Sess. 300, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 86, 96 (40% of failed thrifts failed because of insider fraud).

22. CAL. FIN. CODE § 6503(a)(1)-(2) (enacted by Chapter 1118).

23. *Id.* § 6529(a) (enacted by Chapter 1118). Chapter 1118 also prohibits unearned fees and kickbacks for the referral of business associated with a real estate closing or in connection with a loan on real property made by a savings association. *Id.* § 6529(b) (enacted by Chapter 1118). *Cf.* 12 C.F.R. § 563.40 (1990) (federal prohibition of kickbacks).

24. See CAL. FIN. CODE § 6653.5(e)(4) (enacted by Chapter 1118) (definition of employee).

25. See *id.* § 6530(a) (enacted by Chapter 1118). A whistleblower is any employee who provides information to the Commissioner, the attorney general, or any district attorney concerning any violation of law or regulation by the savings association. *Id.* *Cf.* 12 U.S.C.A. § 1831j(a) (West 1989) (prohibition of discrimination against whistleblowers).

26. CAL. FIN. CODE § 6530(b)-(c) (enacted by Chapter 1118). The employee must bring the action within two years of discharge or discrimination. *Id.*

27. See *id.* § 6653.5(e)(5) (enacted by Chapter 1118) (definition of troubled savings association).

28. See *id.* § 6653.5(e)(1) (enacted by Chapter 1118) (definition of deposit broker).

29. *Id.* § 6653.5(a)-(d) (enacted by Chapter 1118). In a recent United States General Accounting Office (GAO) study, over-reliance on brokered deposits was cited as a major problem in failed thrifts. THRIFT INDUSTRY, *supra* note 3 at 31. See *id.* (recommending approval of legislation restricting the use of brokered deposits by state-chartered savings associations). *Cf.* 12 U.S.C.A. § 1831(f) (West 1989) (restrictions on brokered deposits for troubled institutions).

30. CAL. FIN. CODE § 7250 (amended by Chapter 1118) (listing specific securities in which an association may invest without limit).

acquiring corporate debt securities that are not rated in one of the four highest categories of a nationally recognized rating service.<sup>31</sup>

Existing law permits an association to invest in the securities of a service corporation.<sup>32</sup> Chapter 1118 limits these investments to fifteen percent of the total assets of an association, and restricts the service corporations in which an association may invest to those whose activities are reasonably related to the activities of savings associations.<sup>33</sup>

Prior law permitted an association to make investments in real estate to be used for the production of income or for rental purposes, or to be developed for sale.<sup>34</sup> Chapter 1118 permits associations to make loans for the financing of residential real estate relying on the borrower's general credit standing and projected income for repayment, provided that the association's aggregate investment does not exceed five percent of the association's assets.<sup>35</sup> Under Chapter 1118, an association cannot make a loan secured by unimproved real property if the loan-to-value ratio<sup>36</sup> exceeds eighty percent of the appraised value of the unimproved real property securing the loan.<sup>37</sup>

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31. *Id.* § 7250.5 (enacted by Chapter 1118). Cf. 12 U.S.C.A. § 1831e(d) (West 1989) (prohibiting acquisition of debt securities not of investment grade).

32. CAL. FIN. CODE § 7252(a) (amended by Chapter 1118). *See id.* § 5119 (West 1989) (definition of service corporation).

33. *Id.* § 7252(b)-(c) (amended by Chapter 1118). Whether a corporation's activities are "reasonably related" is determined by the Commissioner. *Id.*

34. 1983 Cal. Stat. ch. 1091, sec. 2, at 3953 (enacting CAL. FIN. CODE § 7350) (repealed by Chapter 1118). In a study by the GAO, acquisition, development and construction loans (ADC loans) were responsible for unsafe transactions at 73% of the failed savings and loans. THRIFT INDUSTRY, *supra*, note 3 at 20.

35. CAL. FIN. CODE § 7505.5 (enacted by Chapter 1118). Cf. 12 U.S.C.A. § 1464(c)(3)(D) (West Supp. 1990) (restrictions on investing in unsecured construction loans). Chapter 1118 also lowers the aggregate percentage of investments an association may have in unauthorized investments. CAL. FIN. CODE § 7507 (amended by Chapter 1118). *See id.* § 7507(a)(1)-(4) (amended by Chapter 1118) (listing reasons an investment is categorized as "unauthorized").

36. *See id.* § 7509(e) (amended by Chapter 1118) (procedure for determining maximum loan-to-value ratio).

37. *Id.* § 7509(d) (amended by Chapter 1118). *See* THRIFT INDUSTRY, *supra*, note 3, at 29 (recommending a set loan-to-value ratio for loans secured by unimproved real property).



ENHANCEMENTS TO THE COMMISSIONER'S  
ENFORCEMENT POWER

Prior law permitted the Commissioner to issue a cease and desist order or require the removal of a director, officer, or employee of an association for a violation of any law, or for "unsafe or unsound business practices."<sup>38</sup> Under Chapter 1118, the Commissioner may issue a cease and desist order if the Commissioner finds, or has reasonable cause to believe, that an association or Affiliated Party has violated any law or engaged in an unsafe or unsound business practice.<sup>39</sup> The Commissioner is given authority to remove from employment any director, officer, employee, or Affiliated Party who has violated specified laws, engaged in unsafe or unsound business practices, or breached a fiduciary duty.<sup>40</sup> The Commissioner must publish any final order, or modification of a final order, from an administrative enforcement proceeding conducted under the provisions of Chapter 1118.<sup>41</sup>

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38. 1983 Cal. Stat. ch. 1091, sec. 2, at 3955 (enacting CAL. FIN. CODE § 8200) (repealed by Chapter 1118).

39. CAL. FIN. CODE § 8200 (enacted by Chapter 1118). The Commissioner may also issue a cease and desist order if the Commissioner finds that an association has maintained inaccurate books and records. *Id.* The Commissioner also has authority to issue orders to correct any condition resulting from violations, including the authority to order restitution, restrict the association's growth, or to dispose of any asset involved. *Id.* § 8200(b)(1)-(6) (enacted by Chapter 1118). *Cf.* 12 U.S.C.A. § 1818(b) (West 1989) (similar federal authorization for cease and desist proceedings).

40. CAL. FIN. CODE § 8201(a)(1)-(3) (enacted by Chapter 1118). The Commissioner may also prohibit these persons from further participation in the affairs of any association. *Id.* In order to remove or prohibit further participation by any person, the Commissioner must find that: (1) The association has or will suffer a loss, the Affiliated Party has financially gained, or that the interest of the association's depositors has been prejudiced; and (2) the violation, practice, or breach involved dishonesty by the Affiliated Party, or demonstrated a disregard for the safety or soundness of the association. *Id.* § 8201(b) (enacted by Chapter 1118). An Affiliated Party who has been removed may not participate in the affairs of the association without the prior written approval of the Commissioner. *Id.* § 8201(e) (enacted by Chapter 1118). Chapter 1118 establishes procedures for removal or prohibition. *Id.* § 8201(c), (d)-(g) (enacted by Chapter 1118).

41. *Id.* § 8202(1)-(2) (enacted by Chapter 1118). After making a determination that publication would seriously threaten the safety of an association, the Commissioner may delay the publication for a reasonable time. *Id.* § 8202(b) (enacted by Chapter 1118).

## **Business Associations and Professions; retail dog sales**

Health & Safety Code §§ 25995.8, 25996.90, 25996.91 (new);  
§ 25995.3 (amended).

AB 4300 (Farr); 1990 STAT. Ch. 1123

Support: Humane Society of the United States, Peninsula  
Humane Society, Humane Society of Santa Clara County

Existing law regulates retail pet dealers<sup>1</sup> selling dogs and cats.<sup>2</sup> Chapter 1123 requires retail pet dealers to provide purchasers with a written statement that the purchased dog is free of any known disease, illness, or condition requiring hospital or surgical procedures.<sup>3</sup> Chapter 1123 also requires retail pet dealers to post a conspicuous notice on a dog's cage containing specified information on the dog.<sup>4</sup>

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1. See CAL. HEALTH & SAFETY CODE § 25995 (West 1984) (definition of pet dealer).

2. See *id.* §§ 25995-25995.5 (West 1984) (regulations cover transportation time and health examination, disclosure, and record keeping requirements).

3. *Id.* § 25995.3(e) (amended by Chapter 1123). A pet dealer may provide a record of a dog's known health problems instead of the written statement. *Id.* Diseases or illnesses subject to disclosure are those that are known or should have been known by the retail pet dealer. *Id.* § 25995.3(g). Dealers who knowingly sell a dog with a disease or illness are subject to civil penalties ranging from \$1000 and loss of license for 30 days for a first offense, to a \$10,000 penalty and loss of license for one year for a fourth offense. *Id.* § 25995.8 (enacted by Chapter Y). See ASSEMBLY OFFICE OF RESEARCH, A CLOSER LOOK AT THE DOGGIE IN THE WINDOW 14 (Apr. 1990) [hereinafter CLOSER LOOK] (survey of veterinarians showed that 48.6% of puppies bought in pet stores were incubating a disease or were sick at the time of purchase).

4. CAL. HEALTH & SAFETY CODE § 25966.90 (enacted by Chapter 1123). The sign must inform the purchaser that information on where the dog was bred and brokered is available. *Id.* A 100-point type sign stating that information on the source and veterinary history of each dog is available must also be posted in close proximity to the dogs cages. *Id.* § 25996.91. See also CLOSER LOOK, *supra* note 3, at 29 (pet stores identified by veterinarians as sources of sick puppies acquired 83.8% of their puppies from outside California).

## **Business Associations and Professions; securities-- transaction exemption qualifications**

Corporations Code §§ 25103, 25608 (amended).

AB 1666 (Wright); 1990 STAT. Ch. 40

Sponsor: State Bar of California

Opposition: Department of Corporations

Existing law exempts specified securities transactions from qualification<sup>1</sup> with the Commissioner of Corporations (Commissioner)<sup>2</sup> if the transaction involves any exchange of securities incident to a merger, consolidation, or certain sales of corporate assets.<sup>3</sup> Chapter 40 provides additional qualification exemptions from the above securities transactions.<sup>4</sup> Chapter 40 also authorizes the Commissioner to require the issuer of the security to file a specified notice of the transaction.<sup>5</sup>

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1. See CAL. CORP. CODE §§ 25110-25115 (West 1977 & Supp. 1990) (qualification requirements for issuer transactions). See also *id.* §§ 25120-25122 (West 1977) (qualification requirements for recapitalizations and reorganizations).

2. See *id.* § 25600 (West Supp. 1990) (powers of the Department of Corporations, and appointment, salary, tenure, and oath of Commissioner).

3. *Id.* § 25103(c) (amended by Chapter 40). The existing exemption applies unless over 25% of the outstanding shares of any class with holders receiving securities in the exchange are held by persons that have California addresses according to the records of the corporation. *Id.* See *id.* ("certain sales of corporate assets" are those assets sold in consideration of the issuance of securities of another corporation). See also *id.* §§ 25102-25105 (West 1977 & Supp. 1990) (exempted transactions). Cf. 15 U.S.C. § 77d (1989) (federally exempted transactions).

4. CAL. CORP. CODE § 25103(h) (amended by Chapter 40). Chapter 40 exempts transactions if all of the following conditions are met: (1) The acquiring corporation has earned a majority of its revenue from its operations during each of the last four quarters, rather than from its investments; (2) the corporation to be acquired has 20 or fewer equity security holders; (3) all equity security holders of the corporation to be acquired have a pre-existing relationship to the acquiring corporation or have the capacity to protect their own interests; (4) all equity security holders have consented in writing to the transaction; (5) the offer and sale of the acquiring corporation's common stock is not accomplished by advertisement; and (6) all equity security holders of the corporation to be acquired receive only one class of common stock or cash. *Id.*

5. *Id.* § 25103(h) (amended by Chapter 40). Chapter 40 additionally imposes a fee for the notice. *Id.* Any failure to file the required notice subjects the issuer to a penalty equal to the fee payable if the transaction had been qualified as otherwise required, without affecting the availability of the allowed exemption. *Id.*

## **Business Associations and Professions; seizures of credit unions**

Financial Code §§ 14300, 14400, 15151 (amended).

AB 2611 (Lancaster); 1990 STAT. Ch. 250

Existing law requires the Commissioner of Corporations (Commissioner)<sup>1</sup> to act as a conservator<sup>2</sup> of a credit union<sup>3</sup> upon discovery of impaired capital,<sup>4</sup> insolvency,<sup>5</sup> unsound operations, or neglected insurance<sup>6</sup> of a credit union.<sup>7</sup> Prior law prohibited this action by the Commissioner prior to a hearing, unless waived in writing by the credit union.<sup>8</sup>

Under Chapter 250, the Commissioner may act after notice and opportunity for a hearing have been given.<sup>9</sup> Chapter 250 authorizes the Commissioner to supervise a merger of the impaired credit union.<sup>10</sup> Chapter 250 also authorizes the Commissioner to appoint a conservator.<sup>11</sup> The appointed conservator must act under the supervision of the Commissioner and perform any acts necessary

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1. See CAL. FIN. CODE § 14003 (West 1989) (definition of Commissioner of Corporations).

2. See CAL. PROB. CODE § 1410 (West 1981) (definition of conservator).

3. See CAL. FIN. CODE § 14002 (West 1989) (definition and purposes of a credit union).

4. See *id.* § 14004 (definition of impaired capital). See also *Pacific States Savings & Loan Co. v. Hise*, 25 Cal. 2d 822, 830-33, 155 P.2d 809, 812-16 (1945) (discussing the sufficiency of evidence required for a finding that a building and loan association's assets were impaired and subject to intervention by the Commissioner).

5. See CAL. FIN. CODE § 14005 (West 1989) (definition of insolvent).

6. See *id.* § 14858 (requiring insurance of share accounts).

7. *Id.* § 14300(a) (amended by Chapter 250). Existing law also requires the Commissioner to maintain possession of a seized credit union until liquidation or until the credit union demonstrates the ability to manage its operations in a satisfactory manner. *Id.*

8. 1988 Cal. Stat. ch. 578, sec. 2, at 1390 (amending CAL. FIN. CODE § 14300).

9. CAL. FIN. CODE § 14300(a) (amended by Chapter 250).

10. *Id.* § 14300(b) (amended by Chapter 250). See *id.* § 15200 (West 1989) (permissibility of mergers of credit unions). See also *id.* § 15204 (West 1989) (effects of a credit union merger).

11. *Id.* § 14300(c) (amended by Chapter 250). See *id.* § 14301 (West 1989) (allowing the Commissioner to appoint an outside agent for purposes of liquidating the credit union). See generally CAL. PROB. CODE § 1872 (West 1989) (effect of conservatorships).

to preserve the assets of the credit union.<sup>12</sup>

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## **Business Associations and Professions; short-form mergers**

Corporations Code §§ 1110, 1300 (amended).  
AB 2259 (Bentley); 1990 STAT. Ch. 1018

Existing law allows a subsidiary corporation,<sup>1</sup> at least ninety percent of which is owned by its parent corporation,<sup>2</sup> to merge into the parent corporation without shareholder approval if a resolution or plan of merger is adopted by the boards of directors of both corporations.<sup>3</sup> Under Chapter 1018, a parent corporation may merge into a subsidiary corporation following the approval of the plan of merger<sup>4</sup> and the filing of a certificate of ownership.<sup>5</sup>

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12. CAL. FIN. CODE § 14300(c) (amended by Chapter 250). The conservator retains the same authority and duration of duties as the Commissioner in the operation of the credit union. *Id.* § 14300(d) (amended by Chapter 250). *See id.* § 14302 (West 1989) (requiring the Commissioner to supervise the performance of the agent assigned to liquidate the assets of the credit union).

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1. *See* CAL. CORP. CODE § 189 (West 1977) (definition of subsidiary corporation).

2. *See id.* § 175 (definition of parent corporation).

3. *Id.* § 1110 (amended by Chapter 1018). A certificate of ownership must also be filed. *Id.* § 1110(a) (amended by Chapter 1018). *See id.* § 1110(e) (amended by Chapter 1018) (requirements of a certificate of ownership).

4. The board of directors of the parent corporation must approve the plan of merger. *Id.* § 1110(a) (amended by Chapter 1018). Where the parent corporation does not own all of the subsidiary, the plan of merger must also be approved by the board of directors of the subsidiary corporation. *Id.* § 1110(b) (amended by Chapter 1018). Where the parent corporation is merged into one of its subsidiary corporations, the plan of merger must provide for pro rata conversion of the outstanding shares and the plan of merger must be approved by the board of directors of the surviving subsidiary corporation. *Id.* § 1110(c) (amended by Chapter 1018).

5. *Id.* § 1110(a) (amended by Chapter 1018). The board of directors of the parent corporation must approve the plan of merger. *Id.* The plan of merger must describe the compensation granted in exchange for surrender of any outstanding shares not owned by the parent corporation. *Id.* § 1110(b) (amended by Chapter 1018). *Cf.* DEL. CODE ANN. tit. 8, § 253 (1988); GA. CODE ANN. § 14-2-1104 (1989); UTAH CODE ANN. § 16-10-70 (1989) (statutes similar to Chapter 1018). *See* Seagraves v. Urstadt Property Company, Inc., No. 10307 (Del. Ch. 1989) (no actionable wrong committed by a short-form merger without a shareholder vote under Delaware Code section 253).

Chapter 1018 applies to mergers involving foreign parent corporations if the laws of the parent corporation's place of incorporation permit short-form mergers and if at least one subsidiary corporation is a domestic corporation.<sup>6</sup>

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## **Business Associations and Professions; small business development corporations**

Corporations Code § 14028 (repealed and new); §§ 14000, 14002, 14022, 14027, 14029, 14039, 14052 (amended); Government Code §§ 15331.2 (new); 15379.11, 15379.13 (amended).

AB 3073 (Woodruff); 1990 STAT. Ch. 1023

Sponsor: California Department of Commerce

Existing law fosters the development of small business opportunities through the Small Business Development Board (Board).<sup>1</sup> Chapter 1023 expands existing law to explicitly include women and minority owned businesses in the definition of "small business entrepreneurs" that are regulated by the Board.<sup>2</sup>

Chapter 1023 permits the executive director of the Board (Director)<sup>3</sup> to temporarily withdraw guarantee authority<sup>4</sup> from a

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6. CAL. CORP. CODE § 1110(h) (amended by Chapter 1018). A certificate of ownership must be filed for each domestic and foreign subsidiary corporation, but not for the foreign parent corporation. *Id.*

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1. See CAL. CORP. CODE §§ 14000-14101 (West 1977 & Supp. 1990). The Board oversees small business development corporations, makes and guarantees small business development loans, approves new corporations and advises the governor on small business issues. *Id.* Chapter 1023 requires the Department of Commerce to compile and maintain a centralized information system on small businesses. CAL. GOV'T CODE § 15331.2(b) (enacted by Chapter 1023). See generally *Review of Selected 1989 Legislation*, 21 PAC. L.J. 331, 382 (1990) (discussing the Small Business Development Corporation Law).

2. CAL. CORP. CODE § 14002 (amended by Chapter 1023).

3. See *id.* §§ 14025, 14026 (West Supp. 1990) (powers and duties of the Director).

4. See *id.* § 14028(a) (enacted by Chapter 1023) (definition of guarantee authority).

corporation if irreparable harm will result absent withdrawal.<sup>5</sup> Chapter 1023 subjects a corporation to suspension of its corporate powers for failure to follow existing regulations, operation plans, or fiscal and portfolio requirements.<sup>6</sup> When reviewing a possible suspension or remedial action plan under Chapter 1023, the Board must consider the extent of the corporation's compliance with the legislative intent of the Small Business Development Corporation Law.<sup>7</sup>

Chapter 1023 requires all funds of a suspended corporation to be transferred to the expansion fund<sup>8</sup> or, temporarily, to another corporation.<sup>9</sup> A suspended corporation may not enjoy the benefits of a small business development corporation and may not be registered with the secretary of state.<sup>10</sup>

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5. *Id.* § 14028(a) (enacted by Chapter 1023). The director must call a board meeting, within 10 working days after issuing a temporary withdrawal, to make a final decision on that withdrawal. *Id.* The corporation's yearly contract and funding for necessary operating expenses remain in effect during the withdrawal period. *Id.*

6. *Id.* § 14028(b) (enacted by Chapter 1023). If a violation is found, the Board may choose to suspend the corporation or to require remedial action. *Id.* § 14028(c) (enacted by Chapter 1023). A suspension decision by the Board is final and may not be administratively appealed. *Id.* If a suspended corporation applies to the Board for relief from suspension by showing that corrective action was taken, the Board may request the secretary of state to issue a certificate of revivor to the corporation. *Id.* § 14029 (amended by Chapter 1023).

7. *Id.* § 14028(d) (enacted by Chapter 1023). The stated legislative intent of the law includes promotion of economic development of small businesses and the coordination of job and development efforts for all corporations in a region that are subject to Chapter 1023. *Id.* § 14002 (amended by Chapter 1023).

8. *See id.* § 14031 (West Supp. 1990) (purpose of expansion fund).

9. *Id.* § 14028(e) (enacted by Chapter 1023).

10. *Id.* § 14028(f) (enacted by Chapter 1023). The corporation may continue to exist as a nonprofit corporation. *Id.*

## **Business Associations and Professions; subcontractors--progress payments**

Business and Professions Code § 7108.5 (amended).

AB 2620 (Eastin); 1990 STAT. Ch. 178

Sponsor: Plumbing-Heating-Cooling Contractors Association

Existing law requires a prime contractor<sup>1</sup> to pay any specialty contractor<sup>2</sup> within ten days from the receipt of a progress payment<sup>3</sup> unless otherwise agreed in writing.<sup>4</sup> Chapter 178 extends existing law to include subcontractors.<sup>5</sup> Any prime contractor or subcontractor violating Chapter 178 is subject to disciplinary action and a fine of two percent of the amount due per month.<sup>6</sup>

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1. See CAL. PUB. CONT. CODE § 4113 (West Supp. 1990) (definition of prime contractor).

2. See CAL. BUS. & PROF. CODE § 7058 (West Supp. 1990) (definition of specialty contractor).

3. See CAL. GOV'T CODE § 66499.3(c)(3) (West Supp. 1990) (definition of progress payment).

4. CAL. BUS. & PROF. CODE § 7108.5 (amended by Chapter 178). See CAL. PUB. CONT. CODE § 10262 (West 1985) (similar requirements for a public works project contractor).

5. CAL. BUS. & PROF. CODE § 7108.5 (amended by Chapter 178). If there is a good faith dispute over any progress payment due, then no more than 150% of the disputed amount may be withheld. *Id.* Cf. N.C. GEN. STAT. §§ 22C-3, 22C-5, 22C-6 (1988) (language similar to Chapter 178 requiring a seven day payment or penalty of one percent interest per month).

6. CAL. BUS. & PROF. CODE § 7108.5 (amended by Chapter 178). In an action brought to secure funds wrongfully withheld, the prevailing party is entitled to recover attorney's fees and costs. *Id.* See *id.* §§ 7090 (West Supp. 1990) (registrar is to investigate the actions of any contractor, and on finding the contractor guilty of an act necessitating disciplinary action, may revoke or suspend any license or registration); 7095 (West 1975) (modes of discipline).



## **Business Associations and Professions; telephonic solicitations**

Business and Professions Code § 17511.12 (new).  
AB 2658 (Cortese); 1990 STAT. Ch. 336

Under existing law, telephonic sellers<sup>1</sup> are required to register with the Department of Justice prior to conducting any business in California.<sup>2</sup> Chapter 336 requires that telephonic sellers maintain a \$50,000 bond in favor of the State of California.<sup>3</sup>

Under Chapter 336, a telephonic seller must notify the Attorney General at least ten days before the start of any promotion offering a premium valued at or over \$500.<sup>4</sup> Chapter 336 also requires the telephonic seller to maintain an additional bond for the value of the offered premium.<sup>5</sup> This bond must be forfeited if the premium has not been awarded to a bona fide customer within thirty days of the date that the premium was to be awarded.<sup>6</sup>

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1. See CAL. BUS. & PROF. CODE § 17511.1 (West Supp. 1990) (definition of telephonic seller).

2. *Id.* § 17511.3(a). Existing law also imposes various punishments for any violation of these requirements. *Id.* § 17511.9 (West 1987).

3. *Id.* § 17511.12(a) (enacted by Chapter 336). This bond is to benefit persons suffering a loss as a result of any violation of the telephonic sellers regulations. *Id.* The bond must be paid out according to the terms of a court order. *Id.*

4. *Id.* § 17511.12(b) (enacted by Chapter 336). The notification must be in writing and must include the details of the promotion. *Id.* This provision of Chapter 336 applies when either the actual market value or the advertised value of the premium is \$500 or more. *Id.*

5. *Id.* The bond must cover total current market value or advertised value, whichever is greatest. *Id.*

6. *Id.* The bond must be maintained until the seller has proven that the premium has been awarded. *Id.*

## **Business Associations and Professions; trade names**

Business and Professions Code § 14400 (repealed).

SB 1734 (Kopp); 1990 STAT. Ch. 347

Sponsor: State Bar Association

Support: California Bankers Association

Under prior law, the first person<sup>1</sup> to adopt and use a trade name<sup>2</sup> was the original owner of the trade name.<sup>3</sup> Chapter 347 repeals this provision.<sup>4</sup>

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1. See CAL. BUS. & PROF. CODE § 14204 (West Supp. 1990) (definition of person).

2. See *id.* § 14208 (West 1987) (definition of trade name). See also *Rainier Brewing Co. v. McColgan*, 94 Cal. App. 2d 118, 123, 210 P.2d 233, 236 (1949) (a trade name relates to a business and its goodwill rather than a vendible commodity).

3. 1941 Cal. Stat. ch. 59, sec. 1, at 709 (enacting CAL. BUS. & PROF. CODE § 14400) (repealed by Chapter 347). See *Weatherford v. Eytchison*, 90 Cal. App. 2d 379, 382, 202 P.2d 1040, 1042 (1949) (California Business and Professions Code section 14400 is an affirmation of common law principles). See also *Golden Door, Inc. v. Oshido*, 437 F. Supp. 956, 966-67 (N.D. Cal. 1977), *aff'd*, 646 F.2d 347 (9th Cir. 1980) (California trade name statute does not require plaintiff to prove actual confusion of consumer or secondary meaning in trade name in order to protect the ownership of the trade name). Cf. 15 U.S.C. § 1127 (1988) (federal definition of trade name); 15 U.S.C. §§ 1051-1127 (federal trademark regulations).

4. 1990 Cal. Stat. ch. 347, sec. 1, at (repealing CAL. BUS. & PROF. CODE § 14400). See generally *New West Corp. v. NYM Co.*, 595 F.2d 1194, 1201, (9th Cir. 1979) (trade name infringement is based on similar considerations as trademark infringement). Cf. 1967 Cal. Stat. ch. 1556, sec. 1, at 3731 (repealing CAL. BUS. & PROF. CODE § 14270) (the first person to adopt and use a trademark was its original owner); CAL. BUS. & PROF. CODE § 14210 (West 1987) (trademark law does not affect rights acquired in good faith at common law).

## **Business Associations and Professions; weights and measures**

Business and Professions Code §§ 12510.5, 12510.6 (repealed); §§ 12500, 12503, 12505, 12506, 12510 (amended).

AB 2792 (Kelley); 1990 STAT. Ch. 338

Sponsor: Department of Food and Agriculture

Support: Pitney Bowes, California Agriculture Commissioners and Sealers Association

Existing law regulates weighing and measuring devices used for commercial purposes.<sup>1</sup> Chapter 338 amends the definition of “commercial purposes,” when the weighing or measuring is done in the presence of the paying consumer, to include computations of charges for the transmission of letters or parcels that weigh less than 150 pounds.<sup>2</sup> Under Chapter 338, the definition of “commercial purposes” specifies parcel scales as a regulated computation device.<sup>3</sup>

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1. CAL. BUS. & PROF. CODE § 12500.5 (West 1987). *See* 4 CAL. CODE REGS. §§ 4000-4028.6 (1990) (tolerances and specifications for weighing and measuring devices).

2. CAL. BUS. & PROF. CODE § 12500(e) (amended by Chapter 338).

3. *Id.*